FILED
FEB 26 2003
OFFICE OF THE CLERK

No. 02-

IN THE SUPREME COURT OF THE UNITED STATES

SHOZDIJIJI SHISINDAY, a/k/a DANNY DEAN THOMAS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

---

PETITION FOR WRIT OF CERTIORARI

STEVEN C. HERZOG
(Counsel of Record)
CYNTHIA M. REED
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Counsel for Petitioner Shozdijiji ShisInday

225 P

TABLE OF CONTENTS

CAPITAL CASE 1

QUESTIONS PRESENTED.....1

OPINIONS BELOW.....3

JURISDICTION 3

JURISDICTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE.....4

REASONS FOR GRANTING THE WRIT.....13

I. IT WAS IMPROPER FOR THE TRIAL COURT TO PERMIT THE INTRODUCTION OF TESTIMONY OBTAINED AT A TRIAL DURING WHICH PETITIONER WAS FORCIBLY MEDICATED IN VIOLATION OF *RIGGINS* V. *NEVADA*.....13

II. PETITIONER WAS UNCONSTITUTIONALLY DEPRIVED OF ANY ABILITY TO PRESENT HIS UNMEDICATED DEMEANOR AT THE TIME OF THE OFFENSE IN SUPPORT OF HIS INSANITY DEFENSE AND MITIGATION OF PUNISHMENT.....19

III. PETITIONER WAS DENIED HIS RIGHT TO A FAIR SENTENCING HEARING WHEN THE TRIAL COURT REFUSED TO INSTRUCT THE JURY THAT EACH JUROR HAD THE ABILITY TO EFFECT A LIFE SENTENCE.....23

CONCLUSION.....30

TABLE OF AUTHORITIES

CASES

Arizona v. *Fulminante*, 499 U.S. 279 (1991).....16

Aschbacher v. *State*, 61 S.W.2d 3d 532 (Tex. App. 2001).....22

Boykins v. *Wainwright*, 737 F.2d 1539 (11th Cir. 1984).....21

Cantu v. *State*, 939 S.W.2d 627 (Tex. Crim. App. 1997).....28

Commonwealth v. *Louraine*, 453 N.E.2d 437 (Mass. 1983).....22

Drope v. *Missouri*, 420 U.S. 162 (1975).....20

Eads v. *State*, 598 S.W.2d 304 (Tex. Crim. App. 1980).....27

Gall v. *Parker*, 231 F.3d 265 (6th Cir. 2001).....21

Hathorn v. *State*, 848 S.W.2d 101 (Tex. Crim. App. 1993).....28

Heffernan v. *Norris*, 48 F.3d 331 (8th Cir. 1995).....21

Higginbotham v. *State*, 807 S.W.2d 732 (Tex. Crim. App. 1991).....22

Johnson v. *State*, 691 S.W.2d 619 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 865 (1985).....25

Jones v. *US*, 527 U.S. 373 (1999).....26, 27, 28, 29

Kelly v. *South Carolina*, No. 00-9280, 2002 WL 21284 (Jan. 9, 2002).....25

Kentucky v. *Stincer*, 482 U.S. 73 (1987).....15

Lawrence v. *State*, 454 S.E.2d 446 (Ga. 1995).....22

Luu v. *State*, 841 P.2d 271 (Colo. 1992).....17, 18

Neder v. *U.S.*, 527 U.S. 1 (1999).....15

Ohio v. *Roberts*, 448 U.S. 56 (1980).....15

Padgett v. *State*, 717 S.W.2d 55 (Tex. Crim. App. 1986).....6, 24

Papantony v. *Hedrick*, 215 F.3d 863 (8th Cir. 2000).....21

Pointer v. *Texas*, 380 U.S. 400 (1965).....15

In re Pray, 336 A.2d 174 (Vt. 1975).....22

Rickman v. *Dutton*, 864 F. Supp. 686 (M.D. Tenn. 1994).....14

Riggins v. *Nevada*, 504 U.S. 127 (1992)..... *passim*

Romano v. *Oklahoma*, 512 U.S. 1 (1994).....6, 25

Rush v. *State*, 491 A.2d 439 (Del. 1985).....26

Satterwhite v. *Texas*, 486 U.S. 249 (1988).....15

Sattiewhite v. *State*, 786 S.W.2d 271 (Tex. Crim. App. 1989) 28

Shafer v. *South Carolina*, 121 S. Ct. 1263 (2001) 25

Simmons v. *South Carolina*, 512 U.S. 154 (1994) 6, 25

State v. *Calderon*, 13 P.3d 871 (Kan. 2000) 16

State v. *Hayes*, 389 A.2d 1379 (N.H. 1978) 22

State v. *Maryott*, 492 P.2d 239 (Wash. App. 1971) 22

State v. *Mitchell*, 727 N.E.2d 254 (Ill. 2000) 22

State v. *Muse*, 967 S.W.2d 764 (Tenn. 1998) 16, 17, 18

State v. *Ramseur*, 524 A.2d 188 (N.J. 1987) 26

State v. *Shoen*, 598 N.W.2d 370 (Minn. 1999) 17, 18

State v. *Williams*, 382 So. 2d 619 (La. 1980) 26

Ex Parte Thomas, 906 S.W.2d 22 (1995), *cert. denied*, 518 U.S. 1021 (1996) 7

Thomas v. *Johnson*, Civ. Action No. H-95-5236 (S.D. Tex. July 2, 1997) 3

Thomas v. *State*, 701 S.W.2d 653 (Tex. Crim. App. 1985) 6

U.S. v. *Brandon*, 158 F.3d 947 (6th Cir. 1998) 21

U.S. v. *Morgan*, 193 F.3d 252 (4th Cir. 1999) 21

U.S. v. *Weston*, 206 F.3d 9 (D.C. Cir. 2000) 21

Whalen v. *State*, 492 A.2d 552 (Del. 1985).....26

STATUTES

28 U.S.C. § 1257(a) (2001).....3

Tex. Code Crim. Proc. Ann. art. 37.0711(d) (Vernon Supp. 2000)..... *passim*

SECONDARY AUTHORITIES

Abraham, Riggins Protects the Insanity Defendant, 44 N.Y. L. Sch. L. Rev. 131 (2000) (citing authorities).....22

Criminal Responsibility, 19 Mental & Physical Disability L. Rep. 283 (May/June 1995) 22

Wilkinson, Roberts, *Insanity Defense*, 41 Amjur POF 2d 615 (2001).....22

CAPITAL CASE

QUESTIONS PRESENTED

1. Was it constitutional error for the trial court to admit into evidence testimony adduced at petitioner's previous trial for capital murder, where petitioner's prior conviction and sentence had been reversed because petitioner had been involuntarily medicated throughout the prior trial in violation of *Riggins* v. *Nevada*, 504 U.S. 127 (1992)?

2. Was it constitutional error for Texas to try petitioner for capital murder and sentence him to death, where his principal defense was insanity, and where he was denied any ability to exhibit his unmedicated demeanor at or about the time of the crime to the jury because, during his first trial in 1982, he was involuntarily medicated in violation of *Riggins* v. *Nevada*, 504 U.S. 127 (1992), and by the time of his second trial in 1998, his mental illness was in remission?

3. Was it constitutional error for the trial court to deliberately misinform the jury, which was deciding whether petitioner would receive a death sentence, about the number of jurors required to agree on a sentence of life in order for a life sentence to be imposed, due to the statutory ban in article 37.0711(i) of the Texas Code of Criminal Procedure?

No. 02-

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, _____

SHOZDIJIJI SHISINDAY, a/k/a DANNY DEAN THOMAS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner Shozdijiji ShisInday a/k/a Danny Dean Thomas respectfully requests that a writ of certiorari issue to review the judgments of the Court of Criminal Appeals of Texas entered on September 12 and November 28, 2001, denying his direct appeal and motion for rehearing and thereby affirming his September 1998 conviction and sentence of death for capital murder.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals, affirming Mr. ShisInday's 1998 conviction and death sentence on direct appeal is unreported. (Reprinted at App. A) The order of the Texas Court of Criminal Appeals denying Mr. ShisInday's timely motion for rehearing is dated November 28, 2001, appears on the court's docket sheet and is unpublished. Justice Johnson's decision to dissent from the denial of rehearing, also dated November 28, 2001, is noted on the court's docket sheet and post card notification. (Reprinted at App. B)

Also relevant to the issues raised by this petition is *Thomas* v. *Johnson*, Civ. Action No. H-95-5236 (S.D. Tex. July 2, 1997) (Black, J.), an unpublished opinion in which the United States District Court, Southern District of Texas, vacated Mr. ShisInday's 1982 conviction and death sentence because he was involuntarily medicated during his first trial in violation of *Riggins* v. *Nevada*, 504 U.S. 127 (1992). (Opinion reprinted at App. C) The State's appeal from that decision was dismissed as untimely.

JURISDICTION

The original judgment of the Texas Court of Criminal Appeals was entered on September 12, 2001. Petitioner filed a timely motion for rehearing, which the Texas Court of Criminal Appeals denied on November 28, 2001.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) (2001).

JURISDICTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. It also involves article 37.0711 of the Texas Code of Criminal Procedure. (Reprinted at App. D)

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari so that the Court can review three federal questions that go to the fundamental fairness of petitioner's trial and death sentence for capital murder. Each of the questions involves the consideration of decisions of this Court and other courts that are in conflict or tension, and the Court should review this case, petitioner submits, both to correct the injustices done in his case, and to resolve and clarify these conflicts and tensions to provide guidance in future cases.

The first two questions raise important issues about the application of the Court's decision in *Riggins* v. *Nevada*, 504 U.S. 127 (1992), that concern both how that decision is to be applied, and whether errors in such application are subject to harmless error analysis. Specifically, the first question arises because the trial court admitted into evidence, over petitioner's objections, testimony adduced during his first trial while he was involuntarily medicated in violation of *Riggins*. Petitioner submits that the introduction of such evidence was error under *Riggins*, and that *Riggins* makes clear that such errors are not subject to harmless error analysis. The Court of Criminal Appeals' declined to decide whether the introduction of this testimony was erroneous, and instead subjected the claim (point of error 10 below) to harmless error analysis, in conflict with *Riggins* and other decisions applying *Riggins*, and held (incorrectly) that the testimony at issue was

"cumulative" and "did not contribute to ShisInday's conviction." (App. A at A-32)

The second question arises because, as a result of (1) petitioner's involuntary medication during his first trial, and (2) the fact that petitioner's paranoid schizophrenia was in remission when he was re-tried some sixteen years later, petitioner was deprived of any ability to present his unmedicated demeanor at or about the time of his crime either in support of his insanity defense or his arguments for mitigation in the penalty phase of the trial. In essence, the jury was presented with a different and mentally much healthier man than the man who was alleged to have committed capital murder. Petitioner's inability to present a more accurate portrayal of his mental illness was the consequence of the State forcibly medicating petitioner during his first trial, and the State's obstinate resistance, for some sixteen years, to petitioner's claims for a new trial as a result of this violation. The Court of Criminal Appeals disposed of petitioner's arguments on this issue (points of error 11 and 12 below) by stating that "*[w]e see no relevancy of ShisInday's demeanor at trial to his presentation of an insanity defense.*" (App. A at A-9) (emphasis added).

Petitioner's third question raises the issue of whether a State is entitled to direct its trial courts, by statute, to deliberately misinform jurors deciding whether to impose a sentence of death about the number of votes necessary to impose a sentence of life, rather than death.

In petitioner's case, the jury was deadlocked for several days on the issue of punishment, with three jurors holding out for a life sentence and one juror informing the trial court that he planned to hold out for "all eternity." Yet that juror was unaware that he had the ability to effect what he thought was the proper and just result in petitioner's case.

Article 37.0711(d)-(f) of the Texas Code of Criminal Procedure, as applicable to petitioner's case, compels the trial court to instruct a jury considering whether to impose the death penalty that, in order to impose a life sentence, ten of the twelve jurors must agree. This instruction is contrary to the powers actually accorded the jury under Texas law, as the law expressly provides that if even one juror holds out for a life sentence, and the jurors do not reach agreement, the defendant automatically receives a life sentence. *Padgett* v. *State*, 717 S.W. 2d 55, 58 (Tex. Crim. App. 1986) (en banc).

Petitioner contends that this procedure violates due process and the Eighth Amendment, and is at odds with the principles enunciated by the Court in such decisions as *Romano* v. *Oklahoma*, 512 U.S. 1 (1994), and *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), which emphasize the importance of not misleading juries considering whether or not to impose a death sentence, and providing juries with accurate information concerning the consequences of their decisions. The Court of Criminal Appeals disposed of this claim (point of error 47 below) summarily, stating without analysis that it "has heard and rejected this argument on numerous occasions." (App. A at A-64)

Prior Proceedings

The crime at issue in this case, the murder of Sylvia Harrison, occurred in July 1981. Petitioner was arrested shortly after the crime occurred and was indicted for capital murder in December 1981. Petitioner was tried for that crime in March 1982, found guilty and sentenced to death. Petitioner's conviction and sentence were affirmed by the Texas Court of Criminal Appeals. *See Thomas* v. *State*, 701 S.W.2d 653 (Tex. Crim. App. 1985). Petitioner's application for habeas corpus relief, which included a claim that he was involuntarily medicated throughout his trial, was litigated in

the Texas state courts for eleven years, and was finally denied in 1995. *See Ex Parte Thomas*, 906 S.W.2d 22 (1995), *cert. denied*, 518 U.S. 1021 (1996). Petitioner then filed an application for a writ of habeas corpus in federal court, and on July 2, 1997, the United States District Court, Southern District of Texas, granted petitioner's application and vacated his conviction, on the ground that he had been involuntarily medicated with anti-psychotic drugs during his trial, in violation of *Riggins* v. *Nevada*. (App. C)

The District Court found that "[t]he record is void of any attempt to justify the medication and the pleadings replete with affidavits testifying to the adverse effect of the medication on Petitioner's demeanor at trial." (App. C at C1-2) Further, the District Court noted that "[t]he medical testimony suggests that Petitioner's prescription could render a person sleepy or sluggish, and trial counsel testified that Petitioner appeared to sleep or feign sleep during the trial." (App. C at C2-3)

The Gilliam Testimony

During petitioner's first trial, Ernest Gilliam was one of the State's key witnesses. Mr. Gilliam testified that petitioner had purchased, from him, the gun that the State contended was the murder weapon. This fact was not established by any other evidence, either at the first trial, or petitioner's subsequent re-trial. The Gilliam testimony thus linked petitioner to the alleged murder weapon in a way that no other evidence did, save petitioner's extremely questionable alleged confession, which petitioner challenged extensively before the jury at both trials.

This testimony was even more important during petitioner's second trial, at which the State introduced testimony concerning DNA analysis performed on blood scrapings allegedly obtained from the murder weapon. Trial

Vol. 18 at 213, 222-24.[1] That DNA evidence, the State contended, demonstrated that blood from the victim was present on this gun, and the Gilliam testimony served as the State's principal way of linking petitioner to that gun. In fact, the Court of Criminal Appeals made express reference to the DNA evidence and the gun in its abbreviated statement of facts in its September 12 Opinion. (App. A at A-5)

This evidence was therefore of critical importance to the State's case. Mr. Gilliam, however, had died in the sixteen years between petitioner's first and second trials, and was thus unavailable to testify. The State, therefore, sought to read Mr. Gilliam's testimony from the first trial into the record at the second trial. (App. E at E-1). Petitioner objected, arguing that this testimony was obtained during a trial at which he was involuntarily medicated in violation of *Riggins* v. *Nevada*. (App. E at E-1-6) The trial court overruled petitioner's objections, and permitted the Gilliam testimony to be read to the jury. (App. E at E-5; App. N)

The Mental Illness Evidence

Petitioner presented extensive evidence of his mental illness at trial, in an effort to support his insanity defense during the guilt trial and his arguments in favor of mitigation during the sentencing phase of the trial. Two expert witnesses identified Mr. Thomas' mental disease as paranoid schizophrenia at the guilt trial.

Dr. Robert Sarmiento, a psychologist in private practice in Houston, diagnosed Mr. ShisInday in 1982 as suffering from paranoid schizophrenia, as well as a borderline personality disorder. (App. P at P-9-10) To reach his diagnosis, Dr. Sarmiento administered a battery of psychiatric

[1] All such references are to the trial transcripts of Mr. ShisInday's 1998 re-trial.

tests to Mr. ShisInday, interviewed him and reviewed his psychiatric history. (App. P at P-3-10)[2] He explained that schizophrenia is "the severe mental disturbance that probably the average person would think of as crazy. It's characterized by delusions or really loss of contact with reality, difficulty to distinguish what's real and what's not real. And it is characterized by delusions, hallucinations, bizarre behavior, things of that sort." (App. P at P-10) Moreover, Dr. Sarmiento linked Mr. ShisInday's disease to the conduct of which he was accused, testifying that someone with Mr. ShisInday's mental defects "can sometimes function well but then when they are under pressure they kind of flip out, to use the lay term, or may have a frankly psychotic episode." (App. P at P-18)

Dr. Kayla L. Paul, a State witness and a psychiatric resident at the time of alleged crime, testified that she examined Mr. ShisInday on July 18, 1981 — just after the crime and just before Mr. ShisInday was arrested. (App. O at O-1-2) She testified that Mr. ShisInday was at that time "a thin and somewhat anxious, cooperative young man who looked tired and was anxious in the context of the story that he was telling in the emergency department [regarding having hit and killed a dog with his car]." (App. O at O-4) Based on her examination, Dr. Paul concluded that Mr. ShisInday was then suffering from "schizoaffective disorder." (App. O at O-5).

During the punishment trial, Dr. Sarmiento testified at length, (App. Q), in addition to Dr. Mark Cunningham, a clinical and forensic psychologist in private practice who similarly examined Mr. ShisInday and reviewed his medical records. Dr. Cunningham spoke at length about Mr.

---

[2] Dr. Sarmiento also testified that Mr. ShisInday was "functionally illiterate" in 1982. (App. P at P-6)

ShisInday's abusive, chaotic and dysfunctional childhood. When asked, he opined that the mitigating circumstances in this case justified a life sentence and that Mr. ShisInday posed little threat of further dangerousness. Mr. ShisInday also presented evidence demonstrating that his paranoid schizophrenia and other mental disorders, at least in part, stemmed from the abuse and neglect that he suffered as a child. Hundreds of pages of medical records, presented to the jury, also documented the history of Mr. ShisInday's mental illness.

Although petitioner presented this extensive evidence of mental illness, he did not appear mentally ill to the jury during his second trial, because his mental illness was in remission by time of that trial, some sixteen years after his first trial and seventeen years after the alleged crime. Dr. Sarmiento testified that, based on a comparison of the batteries of psychological tests he administered to Mr. ShisInday in 1982 and 1998, Mr. ShisInday's schizophrenia was "in remission." (App. Q at Q-10) Sarmiento also testified that Mr. ShisInday's IQ, during this period, rose from 91 to 105. (App. Q at Q-7)

Petitioner raised the issue of his inability to present his demeanor, and the continuing effects of the *Riggins* violation in his first trial, in various *pro se* pleadings filed prior to his second trial (Apps. F and G). Those pleadings were adopted by trial counsel and denied by the trial court (Apps. H and I). Petitioner again raised these issues, arguing that he was deprived of both his due process rights and Eighth Amendment rights, before the Court of Criminal Appeals, as points of error eleven and twelve. (Relevant excerpts from petitioner's opening and reply briefs to the Court of Criminal Appeals are included in the Appendix in Appendix J). Although the State argued before the Court of Criminal Appeals that these claims were not adequately preserved

before the trial court, the Court of Criminal Appeals considered and rejected the claims on the merits, and did not find them to be procedurally barred. (App. A at A-8-9)

The Jury Deliberations[3]

After the parties presented final arguments on the issue of punishment during petitioner's 1998 trial, the jury retired to deliberate at 12:30 p.m. on Thursday, November 19, 1998. Trial Vol. 25 at 60.

The following day, Friday, November 20, 1998, the jury, by note stamped 11:56 a.m., indicated that it was unable to agree on Special Issue No. 3. (App. K at K-1) Petitioner moved for a mistrial, but the trial court denied the motion, indicating that it would send the jury a note to "[p]lease continue your deliberations." *Id.*

A second note stamped 4:20 p.m. that same day indicated that the jury "remain[ed] at the same 9/3 vote," that the three and the nine had not changed from the day before, and insisted they would not change. (App. K at K-2) The note concluded, "[c]ontinued deliberations are futile." *Id.* Petitioner made his second motion for mistrial, which the trial court again denied. *Id.* The trial court instructed the jury, over petitioner's objection, that, "You are to continue deliberating." *Id.*

At 5:05 p.m. that same day petitioner made a third motion for mistrial, which the trial court again denied. (App. K at K-3) Petitioner then requested that the trial court instruct the jury that if they "can't arrive at a unanimous verdict on the special issues concerning favoring death or a 10-person agreement on special issues favoring life that a

---

[3] The full text of the jurors' notes is set forth in Appendix M.

mistrial must be declared and that the defendant would not be discharged, that the defendant would receive an automatic life sentence," and that "they are not to do violence to their own consciences." *Id.* The State objected to the requested instruction on the ground that it would violate Article 37.071(2) of the Texas Code of Criminal Appeals. The trial court denied petitioner's request. (App. K at K-4).

At 5:50 p.m., still on Friday, November 20, the jury sent out its third note. This time, the jury stated that it was still deadlocked three to nine, and that "one of the jurors has made the statement he will hold out for all of eternity and the other two are holding firm." *Id.* Petitioner responded by moving, for a fourth time, for a mistrial, on the same grounds as before and in addition, because "at this point surely any change in any of the juror's [sic] position either for the Defense or against the Defense would violate their consciences." (App. K at K-5) The trial court denied the motion. *Id.*

On Saturday, November 21, the jury resumed its deliberations. *Id.* At 10:18 am, the jurors sent out a fourth note indicating that "the jury is now ten to two, ten votes for no and two votes for yes." *Id.* The defense understood that to mean "that would be ten votes for death and two votes for life" and, on that basis, renewed its motion for mistrial. *Id.* That motion was denied. *Id.* At 5:55 pm, petitioner again moved for mistrial based on the notes sent out by the jury and the likely coercive effect of their being asked to continue to deliberate without instruction. (App. K at K-6) This motion was denied. *Id.*

On Sunday, November 22, 1998, petitioner renewed his motion for mistrial prior to the jury's rendering of a verdict at approximately 10:07 am. *Id.* This motion was

denied, (App. K at K-7), and the sentence of death announced.

REASONS FOR GRANTING THE WRIT

I.

IT WAS IMPROPER FOR THE TRIAL COURT TO PERMIT THE INTRODUCTION OF TESTIMONY OBTAINED AT A TRIAL DURING WHICH PETITIONER WAS FORCIBLY MEDICATED IN VIOLATION OF *RIGGINS* V. *NEVADA*

It is not disputed that the jury which found petitioner guilty of capital murder, and sentenced him to death, heard testimony that was obtained at a trial during which petitioner was forcibly medicated with powerful anti-psychotic drugs, in violation of the rights recognized by this Court's decision in *Riggins* v. *Nevada*, 504 U.S. 127 (1992). The Court of Criminal Appeals, however, refused to consider whether the introduction of this testimony was error, holding instead that even it was error, the testimony at issue was "cumulative" and "did not contribute to ShisInday's conviction." (App. A at A-32)

Petitioner disagrees with both the legal and factual premises underlying this finding. First, petitioner submits that *Riggins* makes clear that such errors are not subject to harmless error analysis, and that the Court of Criminal Appeals' decision is at odds with *Riggins* and subsequent decisions applying *Riggins*. As the Court explained in that case.

> Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have

> been different if Riggins' motion had been granted would be purely speculative. We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril.

Riggins, 504 U.S. at 137.

Indeed, following *Riggins*, the federal court that granted petitioner's application for a writ of habeas corpus in 1997 specifically found that "the pleadings [of habeas counsel] were replete with affidavits testifying to the adverse effect of the medication on petitioner's demeanor at trial." (App. C at C1-2) The court thus held that "it would be futile" and "purely speculative," to try to assess the impact of the medication on petitioner, and vacated petitioner's previous conviction. (App. C at C-2) Other federal courts, also following *Riggins*, have similarly held. For example, in *Rickman* v. *Dutton*, 864 F. Supp. 686 (M.D. Tenn. 1994), the court held that because the "precise consequences of compelling [the defendant] to take mind-numbing drugs cannot be shown from a trial transcript," the court was "foreclosed from conducting harmless error analysis." *Id.* at 714 (quoting *Riggins*).

Petitioner submits that it should not make any difference that the *Riggins* error here involved the improper reading of testimony adduced at one trial where petitioner was medicated, at a second trial during which he was not medicated. The issue is the same as if petitioner had been involuntarily medicated for only a portion of his trial – the portion during which Ernest Gilliam testified. During that portion of the trial, petitioner was again deprived of all of the rights recognized in *Riggins*, including the right to confront

this witness, the right to participate in the trial, the right to assist his counsel in the examination of the witness, and his due process right not to be forcibly medicated. Petitioner's conviction and sentence, we submit, should be reversed as a consequence of this error.[4]

However, rather than follow the *Riggins* holding that *Riggins* errors are not subject to harmless error analysis, the Court of Criminal Appeals applied harmless error analysis to the introduction of the Gilliam testimony. (App. A at A-32) While courts have often applied harmless error analysis to the erroneous introduction of evidence, *see, e.g.*, *Neder* v. *U.S.*, 527 U.S. 1, 18 (1999); *Satterwhite* v. *Texas*, 486 U.S. 249, 257 (1988), we are unaware of any other instance where a Court has applied harmless error analysis to the introduction of testimony obtained in violation of *Riggins*. Nor are we aware of any other instance where a court has applied harmless error analysis to permit the introduction of testimony from a prior proceeding, where that entire prior proceeding was adjudicated to have been tainted by an error

---

[4] The cases dealing with the introduction of testimony adduced during a prior proceeding are entirely consistent with this result. In *Pointer* v. *Texas*, 380 U.S. 400 (1965), the Court held that the State could not introduce the transcript of a preliminary hearing against the defendant, "[b]ecause the transcript of [the witness'] statement offered against petitioner at trial *had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine [the witness]*." *Id.* at 407 (emphasis added). In *Ohio* v. *Roberts*, 448 U.S. 56 (1980), the Court held that prior testimony of an unavailable witness could be introduced when there was sufficient "indicia of reliability" for the prior testimony, including, for example, evidence that the petitioner had an opportunity to cross-examine the witness. 448 U.S. at 66-71; *see also Kentucky* v. *Stincer*, 482 U.S. 73 (1987) (no Sixth Amendment violation where petitioner could confront witnesses at trial). Here, there can be little question that involuntarily medicating a defendant with anti-psychotic drugs while testimony is adduced deprives that testimony of "sufficient indicia of reliability" for it to be introduced in a subsequent proceeding.

not subject to harmless error analysis.[5]

The admission of the Gilliam testimony, we respectfully suggest, does not fit neatly into the division between "structural errors," not subject to harmless error analysis, and "trial errors," which are subject to harmless error analysis. The structural/trial error division distinguishes between structural errors "that infect the *whole* proceeding," and are never subject to harmless error review, since it is "impossible to gauge the error's effect."[6] "Trial errors" which are susceptible to harmless error review, generally include the erroneous admission of evidence and the admission of a coerced or unreliable confession.

Four recent state supreme court decisions illustrate that the structural/trial error division can create ambiguities and confusion in cases like this one. In *State* v. *Calderon*, 13 P.3d 871 (Kan. 2000), and *State* v. *Muse*, 967 S.W. 2d 764 (Tenn. 1998), the Kansas and Tennessee Supreme Courts held that the denial of a defendant's right to be present at, and participate in the defense of, his or her trial is never subject to harmless error review. In *Calderon*, a Spanish speaking defendant with no or poor English skills was denied a

---

[5] Moreover, even if harmless error review applied, which it should not, the error below was not harmless because the Gilliam testimony established damaging facts not demonstrated by other evidence. Particularly when considered together with the trial court's erroneous admission of blood scrapings from the gun, and testimony concerning DNA tests of these scrapings that linked the blood to the decedent, the Gilliam testimony linked petitioner to the alleged murder weapon in a way that no other evidence did, save Appellant's extremely questionable alleged confession, and in doing so, served as the principal piece of forensic evidence linking petitioner to the crime.

[6] The Court set forth examples of structural errors in *Arizona* v. *Fulminante*, 499 U.S. 279 (1991), noting that a deprivation of the right to counsel, a biased judge, and a jury where members of the defendant's racial group were unlawfully screened out, were all "structural errors." *Id. at* 294.

translator for no reason during the closing arguments of his murder trial. 13 P.3d at 241-45. The Kansas Supreme Court held that "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his or her trial." *Id.* at 248; *see also id.* at 245 ("To be 'present' requires that a defendant be more than just physically present. It assumes that a defendant will be informed about the proceedings so he or she can assist in the defense.") (citation omitted). The *Calderon* court expressly linked the fundamental right of an accused to assist in his own defense to the Sixth Amendment rights recognized by this Court in *Riggins*. *See* 13 P.3d at 253 ("This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause.") (citing *Riggins*).

Similarly, the Tennessee Supreme Court in *Muse* reversed an aggravated assault conviction because the defendant was not present on the day his jury was selected. 967 S.W.2d at 766. Acknowledging "a long-standing presumption against waiver of fundamental constitutional rights," *id.* at 767, the court found a defendant's right to be present during selection "so basic to a fair trial that [its] infraction has never been treated as harmless," *id.*

In contrast to *Calderon* and *Muse*, the Supreme Courts of Minnesota and Colorado have applied harmless error review to similar violations of constitutional rights, albeit under less egregious factual circumstances. *See State* v. *Shoen*, 598 N.W. 2d 370 (Minn. 1999), and *Luu* v. *State*, 841 P.2d 271 (Colo. 1992) (en banc.). *Shoen* involved the shackling of a defendant during his murder trial, and the adverse impact that viewing the shackles may have had on the jury. 598 N.W. 2d at 371-74. The Minnesota Supreme Court endeavored to apply the structural error/trial error distinction and concluded that while shackling "may be inherently

prejudicial, the practice is not, in every circumstance, constitutional error." *Id.* at 375. And the Colorado Supreme Court in L*uu* found the absence of an interpreter during closing argument of a murder trial and reading of the jury charge to be harmless, albeit in a circumstance where the defendant's counsel elected to proceed in the absence of the interpreter. 841 P. 2d at 272-73.

Petitioner respectfully suggests that these decisions, and the decision in his case, demonstrate that there is uncertainty as to how to apply the structural/trial error analysis where a defendant is deprived of a fundamental constitutional right during a portion of his trial. In petitioner's case, he was involuntarily medicated with anti-psychotic drugs during the "Gilliam testimony" portion of his trial, when that testimony was re-introduced over his objections. In *Muse*, the defendant was actually not present for a portion of his trial. In *Calderon* and *Luu*, the defendants did not have interpreters available for a portion of their trial. And in *Shoen*, the defendant was shackled for a portion of his trial.

Each of these errors were constitutional violations, and each affected a portion of the defendant's trial, as opposed to the entire trial. Yet the courts have reached different results, while purporting to apply the same legal principles. Petitioner submits that these divergent results are the result of uncertainty as to how to apply the structural/trial error distinction to these types of situations, and he urges the Court to grant his petition so that it can resolve this uncertainty, and correct the injustice in his case.

II.

PETITIONER WAS UNCONSTITUTIONALLY DEPRIVED OF ANY ABILITY TO PRESENT HIS UNMEDICATED DEMEANOR AT THE TIME OF THE OFFENSE IN SUPPORT OF HIS INSANITY DEFENSE AND MITIGATION OF PUNISHMENT

Petitioner, at the time of the alleged crime, suffered from paranoid schizophrenia, a severe mental disorder "characterized by delusions, hallucinations, bizarre behavior, things of that sort." (App. P at P-10) He argued at trial that as a consequence of this severe mental illness, he was legally insane at the time of the offense. He also argued, during the punishment phase of the trial, that this illness mitigated his responsibility for the offense, supporting a sentence of life, rather than death.

While petitioner presented expert testimony that he suffered from this illness at the time of the crime, he was deprived, at both his 1982 trial and his 1998 re-trial, of any opportunity to present his paranoid schizophrenic demeanor in support of his contentions. Rather, at both trials, the jury saw a man who appeared to them to be much healthier and more "normal" than he was contended he was at the time of the trial. Petitioner's own demeanor thus substantially undercut his ability to establish his insanity defense and his arguments in favor of mitigation.

Petitioner was deprived of any ability to present this important demeanor evidence at his first trial because he was involuntarily medicated, in violation of *Riggins* v. *Nevada*, 504 U.S. 127 (1992). He was unable to present this evidence at his retrial because by the time of that trial, some sixteen years later, his illness was in remission. (App. Q at Q-10)

The Court of Criminal Appeals, in response to this claim, held that there was "*no relevancy of ShisInday's demeanor at trial to his presentation of an insanity defense.*" (App. A at A-9) (emphasis added) Petitioner urges the Court to grant his petition for certiorari to correct this error and clarify whether the right to present demeanor evidence has constitutional dimensions in a case where a mentally ill defendant seeks to invoke the insanity defense and argue that his illness militates against the imposition of the death penalty.

The Court's decisions in *Drope* v. *Missouri*, 420 U.S. 162 (1975), and *Riggins* v. *Nevada*, 504 U.S. 127 (1992), touch on this issue, but do not squarely address it. In *Drope*, the Court considered a due process challenge to the portion of Drope's marital rape trial which occurred during his absence, after he shot himself. 420 U.S. at 163-71. The Missouri Court of Appeals had rejected Drope's claim, finding his trial absence voluntary and proof of his incompetency insufficiently established. *Id.* at 171. The Court granted certiorari and reversed. *Id.* In so doing, the Court relied on the common law prohibition against trying mentally incompetent defendants in absentia. *Id.* at 172 (quoting Blackstone); *see also id.* at 180 (noting the significance of demeanor in assessing competency). Indeed it was dispositive to the Court that "as a result of petitioner's absence the trial judge and defense counsel were no longer able to observe him in the context of the trial *and to gauge from his demeanor* [his ability to consult with counsel and understand the proceedings]." *Id.* at 181 (emphasis added). Thus, *Drope* affirms the significance of courtroom demeanor on the issue of competency to stand trial, but does not address the relevance of demeanor in the situations presented by petitioner's case.

The Court in *Riggins* v. *Nevada*, 504 U.S. 127 (1992), addressed a claim that a criminal defendant was deprived of various rights, including the right to present demeanor evidence, as a result of his involuntary medication. The Court, however, did not reach the issue of whether depriving Riggins of the ability to present his unmedicated demeanor violated due process, because it found that the forcible medication had deprived Riggins of other constitutional rights. 504 U.S. at 137-38. The Court also did not decide whether depriving Riggins of the opportunity to present demeanor evidence violated the Eighth Amendment, because that issue had not been presented in Riggins' petition for certiorari. 504 U.S. at 133.

Justice Kennedy, however, concurring in *Riggins*, did reach the demeanor issue, finding that it raised serious due process concerns:

> The side effects of antipsychotic drugs may alter demeanor in a way that will prejudice all facets of the defense. Serious due process concerns are implicated when the State manipulated the evidence in this way.

504 U.S. at 142.

Numerous federal Circuit Courts of Appeal decisions have recognized the critical impact of demeanor evidence on a defendant's insanity defense. *See, e.g., Gall* v. *Parker*, 231 F.3d 265 (6th Cir. 2001); *Papantony* v. *Hedrick*, 215 F.3d 863 (8th Cir. 2000); *U.S.* v. *Weston*, 206 F.3d 9 (D.C. Cir. 2000); *U.S.* v. *Morgan*, 193 F.3d 252 (4th Cir. 1999); *U.S.* v. *Brandon*, 158 F.3d 947 (6th Cir. 1998); *Heffernan* v. *Norris*, 48 F.3d 331 (8th Cir. 1995); *Boykins* v. *Wainwright*, 737 F.2d 1539 (11th Cir. 1984). Many state supreme courts have

adopted a similar view. *See, e.g., State* v. *Mitchell*, 727 N.E. 2d 254 (Ill. 2000); *Lawrence* v. *State*, 454 S.E. 2d 446 (Ga. 1995); *Commonwealth* v. *Louraine*, 453 N.E. 2d 437 (Mass. 1983); *State* v. *Hayes*, 389 A.2d 1379 (N.H. 1978); *In re Pray*, 336 A.2d 174 (Vt. 1975); *see also State* v. *Maryott*, 492 P.2d 239 (Wash. App. 1971).[7] Commentators, as well, have been interested in this issue and argued that demeanor evidence plays an important role. *See, e.g.*, Wilkinson, Roberts, *Insanity Defense*, 41 Amjur POF 2d 615 (2001); Abraham, *Riggins Protects the Insanity Defendant*, 44 N.Y.L.Sch.L.Rev. 131 (2000) (citing authorities); *Criminal Responsibility*, 19 Mental & Physical Disability L. Rep. 283 (May/June 1995).

The Court of Criminal Appeals' decision in petitioner's case is contrary to these authorities, and the Court should grant certiorari to resolve this conflict. The Court can thus address the issues it did not reach in *Riggins*, namely whether depriving a defendant of the ability to present

---

[7] It appears that there are also at least two Texas decisions at odds with the decision in petitioner's case. In *Higginbotham* v. *State*, 807 S.W. 2d 732 (Tex. Crim. App. 1991), the Court of Criminal Appeals reversed a murder conviction due to the erroneous admission of an illegally taped confession. Rather than focus on the content of the confession, Higginbotham's argument was that his calm demeanor on the tape affected the jury's consideration of his insanity defense, as emphasized by the prosecution. *Id.* at 733 ("In fact, the court of appeals acknowledged that the prosecutor's references to the confession did not dwell on the content of appellant's statements. Instead, the prosecutor discussed [the interviewing officer's] impressions regarding appellant's demeanor during the interview.") The *Higginbotham* court accepted this argument, finding that "[b]ecause the jury heard the confession played in court, then was exposed to the prosecutor's questions about appellant's calm demeanor and cooperative attitude during the tapings, the jury was apt to conclude that appellant was not sane at the time of the offense." *Id.* at 737. And last year, the Court of Appeals in San Antonio drew a direct link between demeanor and an insanity defense in *Aschbacher* v. *State*, 61 S.W.2d 3d 532 (Tex. App. 2001), observing that "[i]n fact, the jury may weight other factors in assessing the issue of insanity. Specifically, a fact finder may consider the person's demeanor before and after the offense....".) *Id.* at 535.

demeanor evidence violates due process and the Eighth Amendment where the defendant has asserted an insanity defense and faces a potential death penalty.

III.

PETITIONER WAS DENIED HIS
RIGHT TO A FAIR SENTENCING HEARING
WHEN THE TRIAL COURT REFUSED
TO INSTRUCT THE JURY THAT EACH JUROR HAD
THE ABILITY TO EFFECT A LIFE SENTENCE

Petitioner contends that the statute under which he was sentenced to death, article 37.0711 of the Texas Code of Criminal Procedure, is unconstitutional on its face and as applied in his case. The Court should grant certiorari to consider this claim, which it has not previously considered, and which goes to the integrity of the sentencing process used by the State of Texas to decide whether persons facing the death penalty shall live or die.

In Texas, the jury decides whether or not to sentence a defendant to death by answering "special issues." Article 37.0711, which applies to capital proceedings involving offenses occurring before September 1, 1991, provides that the jurors must unanimously agree if an answer to a special issue is "yes" and that 10 or more jurors must agree if an answer is "no." Tex. Code Crim. Proc. Ann. art. 37.0711(d) and (f) (Vernon Supp. 2000). Part (g) of the statute provides that if the jury returns an affirmative finding on each issue, the defendant is sentenced to death. However, "[i]f the jury returns a negative finding *on or is unable to answer any issue submitted under this article*, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life." Art. 37.0711(g) (emphasis added). Thus, "a jury's inability to answer a punishment question in a

capital murder case has the same sentencing effect as a negative answer." *See, e.g., Padgett* v. *State*, 717 S.W.2d 55, 58 (Tex. Crim. App. 1986) (en banc).

Three possible outcomes are presented by the statute, (1) a unanimous "yes" on each issue, (2) a "no" on one or more issues, or (3) a hung jury, unable to decide "yes" or "no" on one or more issues. The version of the statute applicable to petitioner's case,[8] however, contains the following part (i), which expressly forbids the jury from learning the result of the third outcome:

> The court, the attorney for the state, or the attorney for the defendant may not inform a juror or a prospective juror of the effect of failure of the jury to agree on an issue submitted under this article.

Art. 37.0711(i). It is the prohibition of this part (i) operating in conjunction with part (g) that is the subject of this constitutional challenge.

The jury instructions mandated by this statute necessarily lead jurors to believe that a concurrence of ten is needed to impose a sentence of life imprisonment, when in

---

[8] Article 37.0711 of the Code of Criminal Procedure was enacted in 1993 by the Texas Legislature to extend consideration of an additional special issue for mitigating circumstances to capital cases in which the offense was committed before September 1, 1991. H. 73d Leg., ch. 781, § 2 (Tex. 1993). Subsection (i) of Article 37.0711 retained the prohibition on instructing jurors on the consequences of deadlock challenged here, whereas the Texas Legislature removed the prohibition from article 37.071 which applies to capital cases involving offenses occurring on or after September 1, 1991. Thus, a parallel sentencing procedure has been in place for Texas capital defendants since 1993. The prohibition contained in subsection of Article 37.011 is applicable to defendants like petitioner, who are accused of committing offenses earlier than September 1, 1991. No such prohibition applies to defendants accused of committing offenses on or after September 1, 1991.

fact, any one juror who believes that the prosecution has failed to meet its burden can effectively cause the imposition of a life sentence. *Cf. Johnson* v. *State*, 691 S.W.2d 619, 625 (Tex. Crim. App. 1984) (en banc), *cert. denied*, 474 U.S. 865 (1985) ("under the current Art. 37.071 [analogous to the later enacted Article 37.0711] a defendant in effect need only convince one juror to vote 'no' in order to get the minimum punishment"). The statute thus has the effect of misleading the jury in a substantial number of Texas capital cases, i.e. those involving offenses occurring on or before September 1, 1991, and, correspondingly enhances the likelihood of arbitrary and capricious sentences of death.

In petitioner's case, the impact of the statute was particularly manifest, for the jury was, in fact, deadlocked on the issue of punishment, with several jurors holding out for life. Thus, it is likely that the jurors were speculating as to what would happen if the jury did not reach a unanimous verdict in favor of death, or a verdict of ten in favor of life.

Petitioner contends that misleading the jury in this way is inconsistent with due process and the Eighth Amendment. *See Romano* v. *Oklahoma*, 512 U.S. 1, 9 (1994) (a jury cannot be "affirmatively misled regarding its role in the sentencing process."). Indeed, this Court, in three recent cases, has vacated death sentences where the jury instructions in the penalty phase of a capital case might have led jurors to speculate as to whether a defendant could be eligible for parole if he received a life sentence. *Simmons* v. *South Carolina*, 512 U.S. 154 (1994); *Shafer* v. *South Carolina*, 121 S.Ct. 1263 (2001), and *Kelly* v. *South Carolina*, No. 00-9280, 2002 WL 21284 (Jan. 9, 2002). *Simmons*, *Shafer* and *Kelly* stand for the proposition that in a death penalty case, the jury that is considering whether to impose a death sentence must be provided accurate information that does not create confusion.

Petitioner is of course aware that the Court, in *Jones* v. *US*, 527 U.S. 373 (1999), considered the issue of whether a court is required, in a death penalty case, to instruct a jury as to the consequences of deadlock, and held in that case that such an instruction was not required. 527 U.S. at 378-84.[9] Petitioner submits that the issue presented here is different from the issue presented in *Jones,* in several critical respects.

First, the Texas statute, unlike the federal statute at issue in *Jones*, affirmatively misleads the jury by requiring the trial to instruct the jury that a concurrence of ten jurors is required for a life sentence, when in fact, one juror has the power to effect a life sentence.

Second, the federal statute, unlike the Texas statute, does not misinform the jury concerning the consequences of a failure to agree. Absent an instruction otherwise, the natural impression of most jurors would be that if they fail to agree, the court will be required to convene a new sentencing hearing, before a new jury. That is, in fact, what happens under the federal statute at issue in Jones. By contrast, the Texas statute provides that if the jurors fail to agree, the defendant receives a life sentence. A Texas jury is thus left with the incorrect impression that if they fail to agree, the trial court must convene a new sentencing hearing, and that a new jury will have to assume their responsibility, when in fact the defendant will receive a life sentence.

Third, the petitioner in *Jones* was arguing that the Court should require the lower courts to instruct the jury, in every case, as to the consequences of a failure to agree. Here,

---

[9] A number of state courts have held that an instruction explaining the consequences of a failure to reach a unanimous decision is required in every death penalty case. *See State* v. *Ramseur*, 524 A.2d 188, 283-84 (N.J. 1987); *Whalen* v. *State*, 492 A.2d 552 (Del. 1985); *Rush* v. *State*, 491 A.2d 439 (Del. 1985); and *State* v. *Williams*, 382 So.2d 619, 633-34 (La. 1980).

petitioner is challenging a Texas statute which prohibits the trial court from *ever* instructing the jury as to the consequences of a failure to agree, in cases where the offense occurred on or before September 1, 1991. There is obviously a middle ground between the two positions – that while an instruction may not be required in every case, it is inappropriate for a State to prohibit its trial courts from ever giving such an instruction, even where it is necessary to correct an obvious misimpression.

Fourth, the Texas statute, unlike the federal statute, appears to operate in the way it does by virtue of a mistake, not by design. The legislative history of the predecessor statute to the provision at issue, article 37.071(g), reveals that the changes wrought by the ban on juror consideration of the consequences of deadlock were not addressed or considered by the Legislature.

The two parts of article 37.0711 which are the subject of this constitutional challenge, were first incorporated into the Texas Code of Criminal Procedure in 1981, the same year as the offense in this case, as House Bill 1164. Texas H.B. 1164, 67th Leg. (1981). Prior to 1981, the failure of the capital sentencing jury to agree resulted in a mistrial.[10] The stated legislative purpose of the amendment was to:

> prevent costly re-trials and as you all well know that we have mistrials and have to have re-trials you often lose valuable witnesses and evidence . . . . This saves money for the county and the state. It also will avoid long tie-ups

---

[10] Hearing on H.B. 1164 Before the Committee on Criminal Jurisprudence of the Texas House of Representatives, 67th Leg. (1981); *Eads* v. *State*, 598 S.W.2d 304 (Tex. Crim. App. 1980).

> with courts and our crowded dockets. . . . I think it facilitates a better and more streamlined system of justice.[11]

Thus, the hearings of the legislative committees demonstrate that the declared purpose for the amendment was to prevent mistrials and costly retrials, and there seems to have been no consideration of the "vote-of-ten" requirement and how the amendment would render it obsolete, no mention of the reasons for keeping from the jurors the outcome of their failure to agree, and no discussion of the amendment's effect on jury deliberations.[12] While the Texas Code of Criminal Procedure has undergone significant modifications in the past two decades,[13] the statutory ban in article 37.0711(i) continues to jeopardize important federal constitutional rights.

Finally, the facts of this case distinguish it from *Jones*. Unlike in *Jones*, where the petitioner was unable to show that any "confusion necessarily worked to his detriment," 527 U.S. at 393, we know that three, and later two, jurors in petitioner's case were holding out for a sentence of life for four days. Indeed, one of those jurors indicated that he would

---

[11] House Hearing at 4-5 (Statement of Representative Jones).

[12] It is hard to conceive of a reason why the legislators would not want the jurors to know the effect of their vote, although one judge has suggested that "[t]he Legislature did not want jurors to know that failure to reach a punishment verdict — a hung jury — would not result in the state incurring the additional expense of a retrial." *Sattiewhite* v. *State*, 786 S.W.2d 271, 292 (Tex. Crim. App. 1989) (en banc) (Clinton, J., dissenting).

[13] *See supra* footnote 8; *see also Cantu* v. *State*, 939 S.W.2d 627, 649 (Tex. Crim. App. 1997) (discussing prohibition on juror instruction as to consequences of deadlock in article 37.071 § 2(a) as amended by the 1991 legislature and identical to the older article 37.071(g)); *Hathorn* v. *State*, 848 S.W.2d 101 (Tex. Crim. App. 1993) (en banc) (discussing prohibition on juror instruction in 37.071(g) made effective September 1, 1985).

hold out for "all of eternity." It is likely that if those jurors had known that they each had the power to effect a life sentence, at least one of them would have done so.

In sum, petitioner submits that the Texas statute, both as written and as applied in his case, misled the jury in a way that is qualitatively different from the statute and situation at issue in *Jones*, and that it did so in a way that violated due process and deprived petitioner of the fair sentencing hearing required by the Eighth Amendment. Petitioner respectfully requests that the Court grant certiorari to review this important issue and decide whether it is appropriate for Texas to bar juries hearing death penalty cases from ever learning, even in an exceptional case, that each juror has the power to effect a life sentence.

CONCLUSION

For the foregoing reasons, petitioner requests that the Court issue a writ of certiorari to review the decision of the Texas Court of Criminal Appeals.

Dated: February 26, 2002

Respectfully submitted,

STEVEN C. HERZOG
(Counsel of Record)
CYNTHIA M. REED
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000
(212) 757-3990

INDEX TO APPENDICES

Appendix A	Opinion of the Texas Court of Criminal Appeals dated September 12, 2001
Appendix B	November 28, 2001 Docket Sheet of the Texas Court of Criminal Appeals Indicating Denial of Petitioner's Motion for Rehearing
Appendix C	Order of Federal District Judge Norman Black dated July 2, 1997
Appendix D	Relevant Constitutional and Statutory Provisions
Appendix E	Objection to Gilliam Testimony
Appendix F	Relevant Portions of Petitioner's *Pro Se* Application for Writ of Habeas Corpus in Proceedings Below
Appendix G	Relevant Portions of Petitioner's *Pro Se* Brief in Support of Application for Habeas Corpus in Proceedings Below
Appendix H	Defense Counsel's Pre-Trial Motion to Adopt *Pro Se* Motions of Defendant
Appendix I	Relevant Portions of Pre-Trial Motion Hearing Transcript
Appendix J	Relevant Portions of Petitioner's Opening and Reply Briefs on Appeal
Appendix K	Motions for Mistrial during Jury Deliberations

Appendix L	Requested Jury Instruction during Jury Deliberations
Appendix M	Relevant Juror Notes during Deliberations
Appendix N	Gilliam Testimony
Appendix O	Relevant Testimony of Dr. Kayla Paul
Appendix P	Relevant Portions of Dr. Sarmiento Testimony at Guilt Trial
Appendix Q	Relevant Portions of Dr. Sarmiento Testimony at Punishment Trial

Appendix A

Opinion of the

Texas Court of Criminal Appeals

dated September 12, 2001

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 73,351

SHOZDIJIJI SHISINDAY (a.k.a. Danny Dean Thomas), Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM HARRIS COUNTY

KEASLER, J. ***delivered the opinion of the Court, which*** **Keller, P.J.,** ***and*** **Meyers, Hervy,** ***and*** **Holcomb, J.J.,** ***joined, and which*** **Womack, J.,** ***joined in part, filing a concurring opinion.*** **Price, J.,** ***concurred in the result.*** **Johnson, J.,** ***filed a dissenting opinion.***

OPINION

Shozdijiji Shisinday was convicted of capital murder on September 2, 1998.[1] Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure article 37.0711, §§ 2(b) and 2(e), the trial judge sentenced Shisinday to death.[2] Direct appeal to this Court is automatic.[3]

[1] TEX. PENAL CODE ANN. §19.03.

Shisinday claims that the trial judge erred in numerous respects and that his conviction should be reversed. We affirm Shisinday's conviction.

Factual Background

The evidence at the guilt/innocence phase of trial revealed that in July of 1981 Shisinday and his girlfriend, Phoebe, were staying at the home of James Peels, his two sons, fifteen-year-old Doyle Peels and seventeen-year-old Zendal Peels, and Martha Ann Tarver. On July 17, Shisinday gave Doyle a ride in his 1969 black-and-white Cadillac to pick up Doyle's work schedule at K-Mart. Shisinday entered the store with Doyle and purchased some ammunition in the sporting goods department. Later that evening, Shisinday, accompanied by Zendal, drove Doyle and Ronald McHenry to the skating rink. On the way there, Shisinday stopped next to a police officer at a red light. Shisinday pulled his gun out of the armrest where he normally kept it, pointed the gun at the officer, and asked the boys if he should shoot him. They pleaded with Shisinday to put the gun away. Shisinday waved the gun around at them and then pointed it at Doyle's side. Shisinday returned the gun to the armrest once they arrived at the skating rink. Shisinday and Zendal arranged to pick the boys up at the rink around 10:30 p.m. but never showed up.

According to Shisinday's July 19th transcribed statement and testimony from other witnesses, Shisinday and Zendal went shopping at a Safeway store after dropping the

---

[2] Art. 37.0711, § 2(g). Unless otherwise indicated, all future references to Articles refer to Code of Criminal Procedure.

[3] Art. 37.07, § 2(j).

boys off at the rink. As they were leaving the store, they spotted nineteen-year-old Sylvia Harrison who was having car trouble. They stopped to help her, and Shisinday determined that she needed a new fan belt. They drove her across the street to an auto parts store, purchased the belt, and put it on her car. Harrison asked Shisinday and Zendal to follow her down the street to her house to make sure her car did not overheat again. Once they arrived, Shisinday fixed a leak in her car's "heater hose." She offered them a beer and invited them into the house. They sat in her living room, drank beer, and smoked some marijuana.

According to Shisinday's statement to the police, Zendal unexpectedly hit Harrison in the side of the head with Shisinday's gun, which Zendal had concealed in a paper bag. They carried Harrison, unconscious, out to the car and shoved her down on the passengerside floorboard. They also took several items from her house including her telephone and eye glasses. Shisinday drove away with Zendal sitting in the passenger seat. Harrison regained consciousness, kicked the steering wheel, and bit Shisinday's hand. Shisinday told Zendal to grab her, and Zendal hit her in the head again with the gun, knocking her out. She regained consciousness again, and Zendal repeatedly hit her in the head with his knife until she passed out. She came to once more and began repeating, "God help me." Shisinday got his gun, put it to the side of her head, and shot her one time. They drove her to a bridge near the river and picked up some cinder blocks. They then drove to a more secluded bridge and parked under one of the support pillars. Shisinday looked around to see if anyone was nearby. Zendal removed Harrison's clothes and cut off her bra. After tying cinder blocks to Harrison's feet and neck with rope, they dumped her in the San Jacinto River. Shisinday broke off a willow branch and brushed away their footprints as they returned to the car. They drove to a grocery

store parking lot where they threw Harrison's clothes and other personal items in a dumpster. Then they went to a car wash and washed the outside and inside of the car, particularly the floorboard, which was covered in blood.

Upon arriving at the Peelses' residence just before 4:00 a.m. on July 18th, Shisinday and Zendal were confronted by James Peels who wanted to know where they had been. Shisinday went into the main bedroom where Martha Ann Tarver was sleeping. He woke her and told her that they were late because they had run over a dog and showed her what he claimed was a dog bite on his hand. After Shisinday went to sleep, Tarver, Phoebe, and James Peels went out to Shisinday's car. They saw blood and scratch marks on the passenger side, blood inside the car, blood pooled up inside the armrest area where the gun was, and bloody gloves on the dashboard. Phoebe went inside and argued with Shisinday. Shisinday decided to leave and on his way out said to Zendal, "[i]f I go down, you are going down with me because you are in this with me." Tarver wrote down the license plate number of Shisinday's car and called the police as Shisinday drove away.

Detective Johnny Freeze arrived at the Peelses' and spoke with Zendal Peels. After talking with Zendal, Detective Freeze went to Harrison's residence and discovered that it had been burned. Inside, he found Harrison's purse containing her identification and the receipt for the fan belt. He also saw the new fan belt on her car. Shisinday was arrested around 1:00 a.m. July 19th, while seeking psychiatric treatment at John Sealy hospital at the University of Texas Medical Branch in Galveston ("UTMB"). A warrant was not issued until around 2:00 a.m., and Shisinday received a magistrate's warning shortly after 9:00 a.m. At approximately 9:45 a.m., a Montgomery County sheriff's

deputy found Harrison's nude body submerged in the San Jacinto River.

Just after noon on July 19th, Detective Susan Nixon and Freeze transported Shisinday from the City of Galveston jail to the Harris County Jail. He repeated his dog story, but when interviewed at the jail, Shisinday told Freeze that he killed Harrison. From about 4:00 p.m. until 10:45 p.m., Shisinday gave a written statement to police confessing his involvement in the kidnapping and murder. He was still wearing the bloody clothes he wore while committing the offense. Shisinday directed police to the dumpster, where they found the victim's clothes, telephone, and other items from her house. Upon searching Shisinday's car, police discovered the packaging for a fan belt matching the fan belt receipt in Harrison's purse. They also found a white and orange rope, blood on the passenger-side seat belt strap and buckle, and a .25 caliber handgun with dried blood on the barrel. DNA analysis established that the blood on Shisinday's gun matched Harrison's DNA profile. The odds that another person's blood would match were one in 5.7 billion.

Edward Bellas performed the autopsy on Sylvia Harrison. She had suffered multiple bruises to her body and face, defensive wounds on her hands, three non-fatal stab wounds to her face, and a fatal through-and-through gunshot to her head. The gunshot was not a contact wound but could have been made at close range. Her vaginal cavity was positive for sperm cells but, due to the degradation of the cells, DNA analysis could not be performed. Bellas determined that the rope still tied to her neck and ankles had been put there postmortem.

Procedural History

Shisinday was convicted of capital murder and assessed the death penalty for this offense on March 17, 1982. This Court affirmed the trial court's judgment[4] and later denied Shisinday's application for habeas corpus relief.[5] On July 2, 1997, the United States District Court for the Southern District of Texas granted Shisinday's application for habeas corpus and overturned his conviction based on Shisinday's forced medication during trial.[6] After the Attorney General filed an untimely appeal from the order reversing Shisinday's conviction, Shisinday filed a cross-appeal and a motion to dismiss the State's appeal as untimely. The Fifth Circuit Court of Appeals dismissed the State's appeal. The Attorney General then agreed in the Fifth Circuit Court of Appeals to a stipulation of dismissal in the federal habeas corpus proceedings and Shisinday agreed in this stipulation to dismiss his cross-appeal.[7] Shisinday was then retried, convicted, and sentenced to death again on September 2, 1998. It is from this conviction that he appeals today. He raises fifty-four points of error.

---

[4] *Thomas v. State*, 701 S.W.2d 653 (Tex. Crim. App. 1985).

[5] *Ex Parte Thomas*, 906 S.W.2d 22 (Tex. Crim. App. 1995), *cert. denied*, 518 U.S. 1021 (1996).

[6] *Thomas v. Johnson*, No. H-95-5236 (S.D. Tex. 1997) (not designated for publication).

[7] *Thomas v. Johnson*, No. 97-20770 (5th Cir. Oct. 30, 1997) (not designated for publication).

Points of Error

Pre-Trial

Double Jeopardy

In his thirty-ninth and fortieth points of error, Shisinday complains that his new trial was barred by double jeopardy and the stipulation agreeing to dismiss the federal habeas corpus proceedings in which Shisinday successfully challenged his first conviction. In the stipulation, the Attorney General, representing Gary Johnson, Director of the Texas Department of Criminal Justice-Institutional Division ("TDCJ"), agreed to release Shisinday from the Director's custody and agreed not to file a petition for rehearing in the Fifth Circuit or a petition for writ of certiorari in the United States Supreme Court. Nowhere does the stipulation bind the State of Texas from retrying Shisinday or prevent county authorities from taking Shisinday into custody.

Shisinday also argues that his current death sentence amounts to a second penalty for this crime because he has already served nineteen years in prison for the first conviction. Shisinday cites no authority supporting this proposition.[8] Because Shisinday's conviction was not reversed on the basis of insufficient evidence, there was no legal impediment to the State's retrying Shisinday for the offense.[9] Shisinday's thirty-ninth and fortieth points of error are overruled.

---

[8] *See* TEX. R. APP. P. 38.1(h).

[9] *See Burks v. United States*, 437 U.S. 1, 14-15 (1978) (quoting *United States v. Tateo*, 377 U.S. 463, 465 (1964).

Motion for Continuance

In his fifty-fourth point of error, Shisinday complains that the trial court violated his Sixth and Fourteenth Amendment rights by denying his motion for a continuance to obtain court papers, factual records, and legal research necessary for Shisinday to participate in his defense. These documents, which Shisinday had been accumulating since his first conviction in 1982, were not transferred with him from the penitentiary to the Harris County jail.

All motions for continuance must be sworn to by a person having personal knowledge of the facts relied on for the continuance.[10] Because Shisinday's motion was not sworn to, nothing has been presented for our review.[11] Shisinday's fifty-fourth point of error is overruled.

Insanity Defense

In his eleventh and twelfth points of error, Shisinday argues that the passage of time since his original trial prevented him from presenting an effective insanity defense at his new trial. Specifically, he contends that since his first trial his schizophrenia has gone into remission and that, as a result, the jury did not have the opportunity to observe the full effects of his illness. Had he not been forcibly medicated during his first trial and there not been such a delay in retrying him, Shisinday asserts that the jury would have been more receptive to his insanity defense.

---

[10] Art. 29.08.

[11] *See Montoya v. State*, 810 S.W.2d 160,176 (Tex. Crim. App. 1989), *cert. denied*, 502 U.S. 961(1991).

To succeed on an insanity defense, Shisinday would bear the burden of proving that at the time he committed the offense he "did not know that his conduct was wrong."[12] Thus, the critical time to consider is the time of the offense. Shisinday's competency at the time of his second trial has no bearing on whether he was insane at the time of the offense.[13] As Shisinday states in his reply brief, "there was an enormous amount of evidence presented at Shisinday's 1998 trial concerning his mental illness, which established (1) that he suffered from paranoid schizophrenia, including delusions and other severe effects of that illness, in 1981 and 1982; and (2) that the illness, by 1998, was in remission." Shisinday presented testimony during the guilt/innocence phase from Dr. Robert Sarmiento who diagnosed Shisinday as "paranoid schizophrenic atypical" and whose 88 pages of testimony detail Shisinday's mental history. Sarmiento testified that, based on interviews and testing he conducted in 1982, he believed that Shisinday possibly did not know that his conduct was wrong on July 18, 1981. The delay between trials apparently did not prevent Shisinday from presenting evidence concerning his mental state at the time of the offense. We see no relevancy of Shisinday's demeanor at trial to his presentation of an insanity defense. Shisinday's eleventh and twelfth points of error are overruled.

Inability to Present Witnesses

Shisinday argues in his fifty-second and fifty-third points of error that the passage of time prevented him from presenting the testimony of key witnesses, thereby violating

---

[12] TEX. PENAL CODE ANN. § 8.01.

[13] *See Rodriguez v. State*, 899 S.W.2d 658, 665 (Tex. Crim. App. 1995), *cert. denied*, 516 U.S. 946 (1995).

his due process and speedy trial rights. Specifically, Shisinday argues that he was unable to call Ernest Gilliam and his wife, now both deceased, who could have related the true facts concerning Shisinday's purchasing the gun. But Shisinday does not say what "true facts" these witnesses could have relayed.

Additionally, Shisinday argues that Kathy Brown and John Butler could have testified about his difficult childhood and history of mental illness. Shisinday has not alleged why these witnesses were unavailable or what unique information they could have offered other than the defense's lengthy, detailed testimony concerning Shisinday's childhood and mental illness.

Shisinday argues that J.W. Smith and Mac Louther, two TDCJ employees, could also have offered mitigating evidence. Shisinday presented the testimony of numerous former and current employees of TDCJ who testified that Shisinday worked for more than ten years in the garment factory without violent incident and was a model employee and inmate. Shisinday fails to show that Smith and Louther's testimony would not have been cumulative.

Finally, Shisinday was unable to call his step-father, A.D. Belamy, now deceased, who submitted a sworn affidavit to the court concerning Shisinday's mother's alcohol problems and Shisinday's disoriented demeanor the day after the crime. The affidavit does not present any new information. Dr. Sarmiento testified at length during the punishment phase about Shisinday's "toxic" mother who was physically abusive and unstable. Dr. Cunningham also testified in detail about how Shisinday suffered from extreme childhood neglect at the hands of his alcoholic, abusive mother.

Other than Gilliam, none of these witnesses Shisinday identifies testified during the first trial. Aside from the Gilliams and Bellamy, who are now deceased, there is no indication that the other witnesses were unavailable or unwilling to testify at his second trial. Because the alleged testimony would have been cumulative or immaterial, we cannot say that any alleged delay in itself affected Shisinday's due process and speedy trial rights. Shisinday's fifty-second and fifty-third points of error are overruled.

Void Indictment

The indictment charged Shisinday with capital murder and the lesser-included offenses of murder and kidnapping. If Shisinday were convicted of a non-capital offense, for enhancement purposes the indictment alleged two prior felony convictions of simple burglary and impersonating a police officer. In his eighteenth point of error, Shisinday alleges that the use of non-capital offenses for enhancement purposes rendered the indictment void. Shisinday did not raise this objection before the trial. Because this point was not preserved,[14] Shisinday's eighteenth point of error is overruled.

Confession and Arrest

Shisinday's first two points of error concern the voluntariness and admissibility of his written statement. In his first point of error, Shisinday contends that his written statement was coerced and improperly admitted into evidence. In his second point of error, Shisinday argues that

---

[14] Art. 1.14(b).

he did not voluntarily waive his *Miranda*[15] rights before making the written statement.

On November 10, 1998, the trial court conducted a *Jackson v. Denno*[16] hearing to determine whether Shisinday's written confession was voluntarily and knowingly made. The record of that hearing reveals that around 5 p.m. on July 18, 1981, Shisinday went to the emergency room of John Sealy Hospital in Galveston, Texas, seeking psychiatric help. Between 10 p.m. and 1 a.m. Dr. Kayla Paul, a psychiatric intern, conducted a psychiatric examination and history of Shisinday. Shisinday appeared coherent, did not appear to be under the influence of drugs or alcohol, understood the questions, and responded appropriately. But Dr. Paul noted that Shisinday appeared tired, anxious, and sad. Shisinday told her that someone had told him that he had committed a crime, but he, apparently could not recall the circumstances. Instead, he told her a story about killing a dog. Shisinday recounted meeting the victim the previous day and helping her with her car. Then he and his friend went to the victim's house for a beer. After leaving her house, Shisinday hit a dog with a car. He pulled the dog into his car and, noting that it was injured and suffering, shot the dog in the head. Fearing that the dog's owner would discover what he had done, Shisinday tied some rocks to the dog and dumped it in the San Jacinto river. Shisinday also reported that he had not slept in three days or eaten in two. But he contradicted this when he told Dr. Paul that, after his encounter with the dog, he went to his friend's house and slept until morning.

---

[15] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

[16] 378 U.S. 368, 376 (1964).

Dr. Paul further testified that on the night she examined Shisinday she received a call from Detective Nixon of the Harris County Sheriff's Department, ordering security guards to be posted outside Shisinday's hospital room to prevent him from leaving. Sergeant Ivan Isbell with the UTMB police arrested Shisinday at the hospital around 1:00 a.m. on July 19, 1981, and transported him to the Galveston jail. Around 2:00 a.m., a Harris County district judge signed a warrant for Shisinday's arrest for aggravated kidnapping. Detectives Nixon and Freeze delivered a copy of the warrant to the Galveston jail and around 4:00 or 5:00 a.m. went to the hospital to speak with Dr. Paul. Dr. Paul informed them of the location where Shisinday had described dumping the dog. The police found the victim's body in that location.

At around 9:00 a.m., Nixon and Freeze took Shisinday to Alta Loma to receive the magistrate's warnings and then returned him to the jail. After making arrangements to have Shisinday's car towed to Harris County, the detectives picked Shisinday up from the jail around noon and took him to Hams County jail. On the way, Shisinday expressed to the detectives his fear that they or the police were going to beat him. He explained that guards and inmates at Angola prison in Louisiana had beaten him before and he was apprehensive about being beaten again. Nixon and Freeze assured Shisinday several times that he would not be beaten. During the drive, Shisinday told the detectives his story about the dog.

After they arrived in Houston and Shisinday was processed, he agreed to speak with Nixon in an interview room. Nixon did not repeat the *Miranda* warnings to Shisinday, but reminded him of the warnings that he had received from the magistrate. Shisinday repeated the dog

story. When Nixon showed Shisinday pictures taken of the victim in the morgue, Shisinday burst into tears. Disgusted, Nixon terminated the interview and asked Freeze to take Shisinday to the jail located in the basement of the building. On the elevator, Shisinday told Freeze that he was ready to make a confession, and the two returned to the interview room. Shisinday's oral confession was transcribed between 4 p.m. and 10:30 p.m. The statement was nine pages long and took six hours to transcribe because Shisinday made numerous changes. Shisinday went so far as to correct a grammatical element in the standard form language. Shisinday read and initialed the *Miranda* warnings appearing at the top of the page and signed the original and five copies of the statement. Shisinday's only question related to the meaning of the word "intelligently" in the context of the form language following the *Miranda* warnings: ". . . I knowingly, intelligently and voluntarily waive the rights set out above and make the following voluntary statement." Nixon explained that "intelligently" meant that he understood what he was saying and the consequences of making the statement. Shisinday responded that he did understand and wanted to make the statement. According to Nixon, Shisinday appeared to understand everything during the interview and articulated the details of the crime "extremely well."

During the interview, Shisinday was given clean clothes to wear because he was still wearing the clothes he had on during the offense, and the sweat and blood were beginning to emit a foul odor. Shisinday was also given food, drinks, and cigarettes, and had full access to the bathroom.

At the hearing, the defense presented the testimony of Dr. Robert Sarmiento, a psychologist who gave Shisinday several tests in 1981 and 1982. Dr. Sarmiento testified that Shisinday had an IQ of 91, in the low end of the average

range, had a 4.7 grade level in reading and a 3.9 grade level in spelling. Shisinday's deficient academic achievements led Dr. Sarmiento to conclude that Shisinday had not developed these skills to his intellectual potential. Sarmiento also concluded that Shisinday suffers from fairly severe mental disorders, impairing his ability to make sound judgments and resulting in disturbed thought processes and disorganized thinking. After reviewing Shisinday's personal history, Sarmiento determined that Shisinday suffers from atypical paranoid schizophrenia. Sarmiento concluded that Shisinday's mental disorders probably prevented his understanding the *Miranda* warnings and "quite likely" impaired his judgment to waive his rights. But on cross-examination Sarmiento admitted that he had no evidence to say with certainty that Shisinday did not understand the warnings before he confessed.

Shisinday argues that his confession was involuntary due to his mental illness, lack of sleep for three days and lack of food for four days, a lengthy interrogation, and threats to place him in the jail. He further argues that his credible fear of police violence rendered his confession inadmissible. Shisinday also asserts that he did not understand the *Miranda* warnings due to his mental incapacity and argues that the magistrate neither explained the warnings nor knew if Shisinday actually understood them.

"[A] defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction."[17] When determining whether a defendant's will

---

[17] *Id.*

was overborne in a particular case, courts should assess the totality of all of the circumstances surrounding both the characteristics of the accused and the details of the interrogation.[18]

In a suppression hearing, the trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony.[19] In reviewing the trial court's decision whether to suppress a confession, an appellate court views the evidence in the light most favorable to the trial court's ruling and may not disturb supported findings of fact absent an abuse of discretion.[20] Accordingly, this Court addresses only whether the trial court properly applied the law to the facts.[21]

Based on the evidence adduced at the hearing, the trial court found that (1) Detectives Freeze and Nixon did not abuse, threaten, or promise Shisinday anything in order to coerce him to confess; (2) Shisinday was lucid and capable of understanding the warnings and nature of his statement; (3) Shisinday was not experiencing any hallucinations, delusions, mental illness, or sleep deprivation while giving his statement; (4) there is no evidence that the police sought to deprive Shisinday of food or sleep after his arrest or during his statement; and (5) Shisinday did not request an attorney or

---

[18] *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *State v. Terrazas*, 4 S.W.3d 720, 730 (Tex. Crim. App. 1999).

[19] *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990).

[20] *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

[21] *State v. Ballard*, 987 S.W.2d 889, 891 (Tex. Crim. App. 1999).

invoke his right to remain silent while giving his statement. Accordingly, the court concluded that Shisinday's statement was freely and voluntarily made and was admissible under Articles 38.21 and 38.22.

The trial court's findings are supported by the record of the suppression hearing. Although Shisinday's psychological expert testified that Shisinday probably could not understand the warnings, evidence of the circumstances surrounding Shisinday's statement demonstrates otherwise. There was no indication that Shisinday did not understand the *Miranda* warnings – he inquired about the use of the word "intelligently," corrected a grammatical element in the standard form language, expressed his desire to make the statement, and then provided a lengthy, detailed statement to which he made numerous corrections. Indeed, it was Shisinday's repeated changes to the statement that apparently extended the transcription process. Further, Nixon testified that Shisinday was given food and drink when he requested it. Finally, it was during the car ride to Houston that Shisinday expressed his fear of being beaten, and both Nixon and Freeze assured him that he would not be harmed. After the car ride, Shisinday never raised that concern again.

Although Shisinday sought psychiatric help at the hospital after committing the crime, Dr. Paul noted that Shisinday was lucid and oriented. Shisinday's self-reported auditory hallucinations and out-of-body experiences had occurred in the past and, according to Shisinday, had not happened during commission of the crime.

Because the record does not indicate that Shisinday was unable to understand the *Miranda* warnings or that the State utilized coercive tactics designed to overbear Shisinday's will, we defer to the trial court's findings that

Shisinday knowingly waived his rights and that his confession was both voluntary and admissible. Shisinday's first two points of error are overruled.

In his third through fifth points of error, Shisinday complains that his oral statements were inadmissible for the same reasons as his written statement and because the State gave no notice during the suppression hearing of its intention to introduce the oral statements. He further avers that they were admitted in violation of Article 38.22, § 3(c).

Specifically, Shisinday refers to statements that he made to Lieutenant Carl Borchers during his interrogation. Lieutenant Borchers testified during the guilt/innocence phase that he asked Shisinday whether he recognized some items (a blood-stained shirt and bra, stained panties, a telephone, and some glasses missing the lenses) that police investigators found in a dumpster. Shisinday did. Referring generally to the arguments made against admission of the written statement, defense counsel objected that the oral statements were also inadmissible because they were part of the same custodial interrogation.

Because Shisinday did not lodge an Article 38.22, § 3(c), objection as he does now, we will not address this allegation.[22] Shisinday also failed to object on the basis that the oral statements were not part of the pre-trial suppression hearing. Indeed, counsel apparently considered that the oral statements were included in the suppression hearing, stating, "[W]e have had the pretrial hearing based on the admissibility of the oral statements, written statements and items that were seized from the defendant." Counsel was correct. Detective Nixon testified at the hearing that Lieutenant Borchers

---

[22] *See* TEX. R. APP. P. 33.1(a)(1).

entered the interview room and showed Shisinday the items found in the dumpster. She further testified that Shisinday had referred to these items in the written statement and was the one who informed the police where the items could be found. Accordingly, we find that Shisinday has not preserved this argument for review.[23]

With respect to the preserved portion of his argument, we have already determined that Shisinday understood and knowingly waived his *Miranda* rights and that his written statement was not obtained through coercive State action. Therefore, we find no reason to suppress Shisinday's identification of the items retrieved from the dumpster that belonged to the victim. Shisinday's third, fourth, and fifth points of error are overruled.

In his sixth point of error, Shisinday argues that under the Fourth, Fifth, and Fourteenth Amendments his written and oral statements and the items found in the dumpster should be suppressed because his warrantless arrest was illegal. Specifically, Shisinday contends that a warrant was required because he had an expectation of privacy in the emergency room of the hospital and that the police lacked probable cause to support an arrest because Zendal Peels, whose statements were the sole basis of the arrest, was not a credible witness. Shisinday does not argue that his warrantless arrest was illegal under Article 14 of the Texas Code of Criminal Procedure. Therefore, we address only his constitutional claims.

A warrant is not required when an arrest is supported by probable cause and is made in a public place where the

---

[23] *See id.*

arrestee lacks a reasonable expectation of privacy.[24] Although in this direct appeal, Shisinday now argues that he had a reasonable expectation of privacy in the emergency room, he did not make this argument in his motion to suppress. The accused must establish any personal Fourth Amendment privacy interest at the time of the trial court's "action" on the motion to suppress.[25] Because Shisinday did not timely present this argument at trial, it was not preserved.

With respect to his preserved argument, we find that there was sufficient probable cause to support Shisinday's warrantless arrest. Probable cause to arrest exists when the arresting officer has knowledge based on reasonably trustworthy information that would warrant a reasonable and prudent person in believing that a particular person has committed or is committing a crime.[26] Shisinday's arrest was based in part on the statement obtained from Zendal Peels recounting the events of July 17 and 18, 1981. Zendal Peels' statement to police, which was admitted only for purposes of the suppression hearing conducted outside the jury's presence, contradicted Shisinday's statement in various respects including who hit Harrison and initiated the kidnapping. According to Peels' statement, he had known Shisinday for about three weeks. Shisinday and his girlfriend were staying at the Peelses' trailer because they had been evicted from their apartment. That night, Zendal and Shisinday dropped off Doyle Peels and a friend at the skating rink. On the way home, they saw a woman with car trouble.

---

[24] *United States v. Santana*, 427 U.S. 38, 42 (1976).

[25] *Calloway v. State*, 743 S.W.2d 645, 650 (Tex. Crim. App. 1988).

[26] *Hawkins v. State*, 660 S.W.2d 65, 70 (Tex. Crim. App. 1983).

Shisinday fixed the car, and they followed her home. She invited Zendal and Shisinday in for a beer. After a few minutes, they sent Zendal out to buy cigarettes and later sent him out again to buy beer. After Zendal returned the second time, he noticed that Shisinday and the victim were discussing sex. Shisinday told Zendal to wait outside for about an hour. After a while, Shisinday brought the victim out to the car. She was slung over his shoulder and appeared unconscious. Shisinday put her on the front floorboard of the car. Zendal became scared and started walking away from the car, but Shisinday pulled a gun on him and ordered him to return. Shisinday informed Zendal that he had raped the victim and needed to dispose of her body. He also showed Zendal where the victim had bitten his finger. Shisinday and Zendal drove the victim to a wooded area. Along the way she awoke and began screaming, and Shisinday hit her on the temple with the gun. When she awoke again and started to scream, Shisinday pulled onto a dirt road. Zendal got out of the car and heard one gun shot. Shisinday had shot the victim in the head with a .25 caliber automatic. After Zendal returned to the car, they drove under a bridge. Shisinday ordered Zendal out of the car, disposed of the body, and then returned to pick up Zendal. The following morning, Zendal informed his father and stepmother of what had happened, and they called the police.

The information police received from Dr. Paul sufficiently corroborated Zendal's statement to support a finding of probable cause to arrest Shisinday. As noted above, Shisinday told Dr. Paul that his friend's mother had told him that he had murdered someone. He also told Dr. Paul about helping a stranded motorist and going to her home. His account of shooting a dog and disposing its body in the river coincided with Zendal's statement concerning the victim's fate. Therefore we find that Shisinday's warrantless

arrest was not illegal. Shisinday's sixth point of error is overruled.

In his eighth point of error, Shisinday argues that the trial court erred by permitting introduction of the items recovered from his car because his car was searched and seized without a warrant and without probable cause. The sole basis for Shisinday's argument is that the police were not justified in arresting him and therefore had no justification for seizing and searching the car. We have already determined, however, that Shisinday's arrest did not offend the Fourth Amendment. Further, Shisinday signed a consent to search his car just after completing his written statement, negating the need for a warrant.[27] Shisinday's eighth point of error is overruled.

In his forty-eighth point of error, Shisinday complains that the trial court should have admitted at the suppression hearing the report of Officer Rozell who was deceased at the time of the hearing. The report revealed statements Zendal Peels made concerning his role in the crime that were inconsistent with another statement Zendal had given to police downplaying his involvement in the murder. Consequently, Shisinday argues that the report was relevant to show that Peels was an unreliable source of information and could not be used to establish probable cause. The State argues that this was inadmissible hearsay.

---

[27] *See Carmouche v. State*, 10 S.W.3d 323, 331(Tex. Crim. App. 2000) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)).

As a general rule hearsay is admissible during a suppression hearing to show probable cause.[28] But only the officers) who obtained the evidence which led them to conclude that there was probable cause to arrest a suspect can testify as to how they reached that determination.[29] At the suppression hearing, the State called Detective Nixon and Detective Freeze, who were the primary investigators of this crime. The record reflects that Nixon and Freeze were the individuals who prepared the offense report after Shisinday was located, drew up a warrant, and had the warrant signed based on probable cause. Officer Rozell was the first officer to arrive at the Peeles' and talk to Zendal. At the suppression hearing both Nixon and Freeze testified as to what Rozell had told them. As for Rozell's report, the record does not indicate whether Nixon and Freeze even had this report before they determined that there was probable cause to arrest Shisinday. If they did not have the report, the information contained in it would be irrelevant for purposes of determining if Nixon and Freeze had probable cause. Its exclusion would thus not be improper.

Even if Nixon and Freeze had the report at the time of the arrest, Shisinday still cannot show that he was harmed by the trial court's failure to admit it. Shisinday argues that this report demonstrates that Zendal had conflicting stories and was therefore an unreliable source to rely on for probable cause. But Rozell's report does not conflict with the oral and written statements Zendal gave Nixon and Freeze before

---

[28] *See Cambell v. State*, 910 S.W.2d 475, 479-80 (Tex. Crim. App. 1995), *cert. denied*, 517 U.S. 1140 (1996); *Murphy v. State*, 640 S.W.2d 297, 299 (Tex. Cr. App. 1982).

[29] *See Cambell v. State*, 910 S.W.2d at 479-80; *McVickers v. State*, 874 S.W.2d 662, 665-66 (Tex. Crim. App. 1993).

Shisinday was arrested on July 19th (between 12:00 a.m. and 1:00 a.m.) Zendal did not change his story until July 20 – after Nixon and Freeze had determined that there was probable cause to arrest Shisinday. Therefore, Shisinday's forty-eighth point of error is overruled.

Shisinday contends in his seventh point of error that the trial court's failure to conduct the suppression hearing before trial violated his due process rights. Specifically, he argues that the court waited until after six witnesses testified and various exhibits were introduced – including the murder weapon and photographs of items removed from Shisinday's car – to conduct the suppression hearing. According to Shisinday, some of the testimony and exhibits would not have been admissible had the court granted the motion to suppress. Therefore, Shisinday contends that the court had an interest in denying the suppression motion, because granting the motion would have resulted in a mistrial, with double jeopardy concerns perhaps barring further prosecution.

Shisinday does not specify what testimony or other exhibits would have been excluded had the court granted the motion to suppress, other than the gun and pictures of the car. Article 28.01 leaves to the trial court the discretion whether to hold a pretrial hearing to suppress evidence.[30] Even if Shisinday could establish that the trial court abused its discretion in holding the hearing after the trial began, Shisinday has not demonstrated how the timing of the hearing harmed him. As noted above, Shisinday has not established that his car was illegally seized or searched. And the facts surrounding the seizure and search of his car were not well developed at the suppression hearing. Because Shisinday has

---

[30] *See Calloway v. State*, 743 S.W.2d at 649.

not demonstrated that the items seized from the car were inadmissible, we cannot see how Shisinday was harmed by admitting the gun and the photographs of those items seized from his car, irrespective of when the hearing was conducted. Shisinday's seventh point of error is overruled.

Trial – Guilt/Innocence

Voir Dire

In his thirty-first point of error, Shisinday contends that the trial court erred by failing to quash the first jury panel after reading them an abandoned aggravated rape charge in the indictment. Shisinday complains that he was deprived of a fair and impartial jury because three members of this tainted panel served on the jury. The paragraph Shisinday complains of read as follows:

> It is further presented that in Harris County, Texas, Danny Dean Thomas, hereafter styled the defendant, heretofore, on or about July 18, 1981, did then and there unlawfully, while in the course of committing and attempting to commit the felony of aggravated rape of Sylvia Elaine Harrison, hereafter styled the complainant, intentionally cause the death of the complainant by shooting the said complainant with a gun.

After the court finished reading the indictment and general instructions to the jury, defense counsel moved to quash the jury panel because the rape charge had been dismissed 17 years earlier and would inflame the jury. The trial judge denied the motion and informed counsel that he would afford counsel additional peremptory strikes "to make

up for it." The court also re-read the correct murder-in-the-course-of-kidnapping charge, to each prospective juror during individual voir dire.

Shisinday argues that re-reading the correct indictment was insufficient to correct the error and confused the jurors because it could not eliminate the stigma of the rape charge. Shisinday further contends that the abandoned charge was particularly prejudicial because the State made rape a "theme" of the trial and emphasized it at closing arguments.

In essence, Shisinday is arguing that the three tainted jurors should have been excluded from the jury. Although the court offered Shisinday the remedy of additional strikes to remove these jurors, Shisinday failed to exercise his available strikes. In fact, he did not even have to request additional strikes because he used only eleven of his original fifteen strikes. Therefore, Shisinday has not preserved error. Shisinday's thirty-first point of error is overruled.

In his thirty-sixth point of error, Shisinday argues that the State's voir dire interviews deprived him of a fair trial and due process because the State inaccurately explained to the venire the terms "deliberate" and "intentional" and the trial court did not define these terms in the charge. Shisinday cites to the voir dire examination of veniremember Keith Barker as an example of the prosecutor's alleged improper voir dire. Because Shisinday cites to no other instances in the record, we limit our consideration only to Barker's voir dire.[31]

Shisinday has waived this allegation because he did not make a contemporaneous objection at trial with respect to the State's discussion of "intentional" and "deliberate" with

---

[31] *See* TEX. R. APP. P. 38.1(h).

veniremember Barker.[32] And Shisinday has not pointed us to any other place in the record where he might have lodged such an objection. Shisinday's thirty-sixth point of error is overruled.

Shisinday complains in his thirty-seventh point of error that he was denied due process and a fair trial when the prosecutor improperly instructed veniremember Barker on voir dire to consider the victim when answering the mitigation special issue. He further contends that the State violated his rights by informing Barker that some people might consider a defendant's youth and mental abilities to be mitigating while others might not. Because Shisinday did not object to the State's discussion of youth and mental abilities with Barker, he has not preserved this allegation for review.[33]

With respect to Shisinday's allegation concerning the prosecutor's requesting Barker to consider the victim, the following colloquy is relevant:

> Q. Now, I understand your concern about people not making decisions on emotions.
>
> A. Yes.
>
> Q. But I just want to make sure that not lost in that is the fact that obviously there is a victim in this case.
>
> A. Oh, yes.

---

[32] *See* TEX. R. APP. P. 33.1(a).

[33] *See id.*

Q. Someone has already given up their life.

A. Right.

[Page 29 is missing from Master]

evidence is relevant to the mitigation issue.[34] Thus, it was not improper for the prosecutor to remind Barker to consider the victim when answering the mitigation special issue. We agree with the trial court that the prosecutor was not trying to convince Barker to answer the mitigation issue based on emotion, but instead was reminding him to remember the victim. Shisinday's thirty-seventh point of error is overruled.

In his thirty-eighth point of error, Shisinday argues that prospective juror Jera K. Simpson was wrongly excused based on her opposition to the death penalty. But the State did not challenge this veniremember for cause. Instead, the State exercised a peremptory challenge against this witness without comment, as it was entitled to do.[35] Shisinday's thirty-eighth point of error is overruled.

Improper Exclusion of Evidence

In his twenty-first and twenty-second points of error, Shisinday argues that he was denied the right to confront Zendal Peels, who had invoked his right against self incrimination. The court did not permit Shisinday to call Zendal as a witness or to comment on his absence.

Zendal informed the court outside the jury's presence that he would invoke his Filth Amendment privilege against self incrimination if called as a witness. Zendal's assertion of his Fifth Amendment right overrode Shisinday's

---

[34] 983 S.W.2d 249, 264-272 (Tex. Crim. App. 1998), *cert. denied*, 526 U.S. 1070 (1999).

[35] *See Garcia v. State*, 919 S.W.2d 370, 395 (Tex. Crim. App. 1996); *Tennard v. State*, 802 S.W.2d 678, 682 (Tex. Crim. App. 1990); *cf. Casarez v. State*, 913 S.W.2d 468, 295-96 (Tex. Crim. App. 1995).

constitutional right to compulsory process of witnesses.[36] Therefore Shisinday was not entitled to call Zendal to testify.[37] Shisinday's twenty-first and twenty-second points of error are overruled.

Improper Admission of Evidence

Shisinday's first conviction was reversed in a federal habeas corpus proceeding because he was forcibly medicated during his trial which violated his due process rights.[38] In his tenth point of error, Shisinday complains that his due process right to confront witnesses was violated when testimony from this first trial was introduced at his new trial. Shisinday contends that due to his involuntary subjection to antipsychotic medication, which induced him to sleep during substantial portions of his first trial, he was prevented from confronting the State's witnesses. He argues, therefore, that he was once again deprived of his right to confront a State's witness when the court allowed the testimony of Ernest Gilliam, who was deceased at the time of Shisinday's second trial, to be read into the record. Gilliam's testimony linked Shisinday to the purchase of the murder weapon.

Gilliam's testimony, which is less than four pages long, revealed that he had sold the .25 caliber gun to Shisinday for $50. There was other evidence that linked Shisinday to the gun – the gun was found covered in blood in

---

[36] *See Bridge v. State*, 726 S.W.2d 558, 567 (Tex. Crim. App. 1986).

[37] *See, e.g., id.*; *Ellis v. State*, 683 S.W.2d 379, 382 (Tex. Crim. App. 1984).

[38] *Thomas v. Johnson*, H-95-5236 (S.D. Tex. July 2, 1997) (citing *Riggins v. Nevada*, 504 U.S. 127 (1992)).

Shisinday's car, other witnesses testified that the gun used in the murder belonged to Shisinday, and Shisinday confessed to shooting the victim with that gun. We need not determine whether admission of Gilliam's testimony violated Shisinday's Sixth Amendment right to confront this witness because the testimony was cumulative and did not contribute to Shisinday's conviction.[39] Shisinday's tenth point of error is overruled.

Shisinday argues in his thirteenth and fourteenth points of error that blood scrapings taken from the murder weapon were not properly authenticated and that their admission was reversible error. At trial, the State introduced evidence that a gun with serial number 132,143 was seized from Shisinday's car, sealed in an envelope, and taken to the Department of Public Safety ("DPS") laboratory in Austin. Sandra Budge with the DPS crime lab testified that in 1981 she attempted to type the blood found on the gun but was unable to do so. She further explained that DNA analysis was not available at that time. Then the State asked Budge the following questions:

> Q: Now, let me show you what's been marked as State's Exhibit 100. Do you recognize the contents of 100?
>
> A: Exhibit 100 is given the unique case number that was assigned to this case.
>
> Q: And is that something had contained evidence regarding some blood scrapings from Lab No. 155,287

---

[39] *See* TEX. R. APP. P. 44.2.

regarding a pistol with serial number 132,143?

A: Yes, ma'am.

Q: Now, on that envelope is there any type of initial at the time of who did the scraping, who performed the scrapings of this substance? Is there any type of initial of who actually was the one to take the scrapings from the weapon?

A: I don't see one, no.

Q: Okay. But this would have been something – it does have the unique lab number of L-155,287?

A: Yes, ma'am.

Q: And it would have been held at the crime lab in the vault?

A: Yes, ma'am.

Q: Under that case number?

Q. Yes, ma'am.

The State then called Kathleen Corrado, a DNA analyst with the DPS crime lab, who testified that her supervisor had instructed her to extract DNA from State's Exhibit 100. At this point, the State offered State's Exhibit 100 into evidence. The defense asked Corrado a few questions on voir dire concerning how she obtained the evidence she tested, and then the State again offered State's

Exhibit 100 into evidence. The defense objected, "To 100 we object for the reason that there is no predicate as to who did whatever was done with this – who put this evidence in this paper bag here and we object to all of the hearsay contained on State's Exhibit No. 100." Written on the exhibit was "blood scrapings from barrel of .25 caliber pistol." After the exhibit was admitted, Corrado confirmed that she did not know who had scraped the blood from the gun and placed it into the envelope.

The State argues that Shisinday has waived this allegation for failing to object when Budge first attempted to identify the contents of State's Exhibit 100 as blood scrapings. But it is not clear that Budge's affirmative answer to the prosecutor's question, "And is that something had contained [*sic*] evidence regarding some blood scrapings from Lab No. 155,287 regarding a pistol with serial number 132,143?" actually identified the contents of Exhibit 100 as blood scrapings. Further, in her answer to the next question Budge revealed that there was no indication of who performed the scrapings. The State waited until Kathleen Corrado testified to offer Exhibit 100 into evidence, and Shisinday objected at that time. Accordingly, Shisinday's objection to admission of Exhibit 100 was not untimely. And, although inartfully stated, we find defense counsel's objection was sufficient to put the trial court on notice that the proper predicate had not been laid to establish who took the blood scrapings from the gun.[40]

Rule of Evidence 901(a) provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a

---

[40] *See* TEX. R. APP. P.33.1(a)(1)(A).

finding that the matter in question is what its proponent claims." One method of providing such evidence is through the "testimony of a witness with knowledge."[41] But the two witnesses who testified regarding Exhibit 100 did not know who had scraped blood from the gun, placed the scrapings in the envelope, and written "blood scrapings from barrel of .25 caliber pistol." Thus, the only predicate laid to establish that Exhibit 100 was blood scrapings taken from the gun was Corrado's assumption based on the hearsay writing. Accordingly, we find that the court's admission of Exhibit 100 was an abuse of discretion.[42]

But the admission of this evidence did not affect Shisinday's substantial rights.[43] There was significant evidence at trial establishing Shisinday's gun as the murder weapon. Martha Ann Tarver recognized the .25-caliber weapon as Shisinday's gun. A few hours after the murder, she saw the gun resting in a pool of blood in the armrest of Shisinday's car. Detective Olive seized the gun from Shisinday's car and observed dried blood on the barrel. Most significantly, Shisinday admitted in his written statement to shooting the victim point blank in the head with the gun. Given this evidence, we hold that admission of the blood scrapings could not have had "a substantial and injurious effect or influence in determining the jury's verdict."[44] Shisinday's thirteenth and fourteenth points of error are overruled.

---

[41] TEX. R. EVID. 901(b)(1).

[42] *See Angleton v. State*, 971 S.W.2d 65 (Tex. Crim. App. 1998).

[43] *See* TEX. R. APP. P. 44.2(b).

[44] *Jackson v. State*, 17 S.W.3d 664, 672 (Tex. Crim. App. 1999).

In his nineteenth point of error, Shisinday argues that admission of duplicative photos inflamed the jury. He contends that because the photos were more prejudicial than probative, their admission violated Rule of Evidence 403. Specifically, Shisinday complains of State's Exhibits 33, 69-71, 84-86, 88, 90, 92.

We must determine whether admission of the photograph constitutes an abuse of discretion under Rule 403.[45] Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial.[46] In determining whether the probative value of photographs is substantially outweighed by the danger of unfair prejudice, a court may consider several factors including the number of exhibits offered, their gruesomeness, their detail, their size, whether they are black and white or color, whether they are close-up, whether the body depicted is naked or clothed, and the availability of other means of proof and the circumstances unique to each individual case.[47] Generally, a photograph is admissible if verbal testimony as to matters depicted in the photographs is also admissible.[48]

Shisinday has forfeited this point of error with respect to Exhibits 69-71. In his brief, he challenges these photos as

---

[45] *Montgomery v. State*, 810 S.W.2d 372, 391(Tex. Crim. App. 1990) (op. on reh'g).

[46] *See Long v. State*, 823 S.W.2d 259, 271(Tex. Crim. App. 1991), *cert. denied*, 505 U.S. 1224 (1992).

[47] *Chamberlain v. State*, 998 S.W.2d 230, 237 (Tex. Crim. App. 1999), *cert. denied*, 120 S. Ct. 805 (2000).

[48] *See Long*, 823 S.W.2d at 271-72 n.18.

duplicative and overly prejudicial. At trial, however, he objected only that Exhibits 69-71, photos of Shisinday's car, were inadmissible as the product of an illegal search and seizure. Because this alleged error is not supported by a comporting objection at trial, we decline to address it.[49]

State's Exhibit 33 is an autopsy photo of Sylvia Harrison's face. The approximately three-by-five-inch photo shows extensive bruising on her cheek and eyelids and depicts the rope still tied around her neck. The State introduced this photo through the testimony of Harrison's aunt to identify the person in the autopsy photo as Sylvia Harrison. The pathologist, Dr. Edward Bellas, testified that the gunshot wound through Harrison's head caused the telltale black eyes. He also testified that she had suffered bruises and three stab wounds to the face. Because the photo was introduced to establish the victim's identity and depicted only the wounds Shisinday inflicted, the trial court did not abuse its discretion in finding this photo more probative than prejudicial.[50]

Exhibits 84-86, 88, 90 and 92 are three-by-five autopsy photographs of Harrison's neck after the rope was removed, and her face, ankle, arm, hand, and finger, showing the various injuries she suffered during the kidnapping, murder and disposal of her body. Not only did the pathologist's testimony describe these wounds, but the photos also served to corroborate Shisinday's statement concerning his and Zendal's efforts to push Harrison into the car and

---

[49] *See Barnes v. State*, 876 S.W.2d 316, 325 (Tex. Crim. App.), *cert. denied*, 513 U.S. 861(1994).

[50] *See Santellan v. State*, 939 S.W.2d 155, 172 (Tex. Crim. App. 1997).

overwhelm her during the periods in which she would regain consciousness. Further, the photos are not duplicative. Each one depicts a separate injury. The court excluded Exhibits 87, 89 and 91, which were additional autopsy photos. The photos show only what Shisinday and Zendal did to the victim, and testimony concerning the wounds she suffered was admissible. Therefore, the trial court did not abuse its discretion in permitting their admission. Shisinday's nineteenth point of error is overruled.

Shisinday argues in his twentieth point of error that an extraneous bad act was improperly admitted during the guilt/innocence phase of trial. Specifically, he refers to the incident earlier on the night of the murder in which Shisinday pulled out his gun and pointed it at a police officer stopped next to them at a red light. Doyle Peels and Ronald McHenry testified that Shisinday pulled the gun out of the armrest, waved it around, pointed it at the police officer, asked if he should shoot the officer, and eventually returned the gun to the armrest. Although Shisinday lists Rules of Evidence 401, 403, and 404(b) , as bases for challenging this evidence, his objection at trial that the evidence was not relevant and "its prejudicial and inflammatory nature outweighs that relevance" involves only Rules 401 and 403.

The State argues that the evidence was relevant and probative to demonstrate Shisinday's exercising control and possession of the weapon before the murder. In *Ransom v. State*, we held that the trial court did not abuse its discretion in admitting evidence that Ransom had burglarized a vehicle to obtain the gun he used in the primary murder.[51] We noted that the challenged evidence was relevant to demonstrate

---

[51] *Ransom v. State*, 920 S.W.2d 288, 300-01 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1030 (1996)).

Ransom's ownership of the gun and that the "trial court was justified in concluding that the jury would not be swayed to convict [the defendant] of capital murder on the basis of the comparatively minor offense of burglary of a motor vehicle."[52] We invoke the same reasoning here. Shisinday's removing the gun from his armrest, pointing it at the officer, waving it around at the other passengers in the car, and returning it to the armrest demonstrated Shisinday's ownership and control of the murder weapon. Thus, this evidence served to corroborate Shisinday's admission in his written statement that he was the one who shot Harrison. The probative value was not "substantially outweighed by the danger of unfair prejudice."[53] Accordingly, we hold that the trial court did not abuse its discretion in admitting the extraneous-offense evidence.[54] Shisinday's twentieth point of error is overruled.

In his thirtieth point of error, Shisinday argues that admission of testimony implying that Harrison may have been raped, an offense not charged in the indictment, violated Rules of Evidence 401 and 403. Specifically, he challenges the testimony of Dr. Bellas, the medical examiner, and Kathleen Corrado, a DPS DNA analyst, concerning swabs taken from the victim's mouth, vagina, and anus, and the discovery of seminal fluid in the vaginal cavity. The defense did not object to this testimony and stated that it had no objection when the State moved to admit the slides prepared from the swabs. Because he has not preserved this issue for

---

[52] *Id.*

[53] TEX. R. EVID. 403.

[54] *See Lane v. State*, 933 S.W.2d 504, 521(Tex. Crim. App. 1996).

appellate review,[55] we overrule Shisinday's thirtieth point of error.

Factual Insufficiency

Shisinday contends in his fiftieth point of error that the admissible evidence was factually insufficient to establish his guilt of the charged crime. He argues that without his "involuntary, coerced statement, as well as any 'fruits' of Shisinday's warrantless arrest, such as items found in Shisinday's car," the State could not prove that Shisinday was guilty of capital murder beyond a reasonable doubt.

We have overruled Shisinday's points of error challenging the legality of Shisinday's statement and the fruits of his arrest. Additionally, in addressing the legal sufficiency of the evidence to support a defendant's conviction, we review all evidence before the jury – whether properly or improperly admitted.[56] We explained this rule in *Thomas v. State*:[57]

> In the event a portion of this evidence was erroneously admitted, the accused may complain on appeal of such error. If his complaint has merit and the error is reversible, . . . a new trial should be ordered. But jurors do not act irrationally taking such evidence into account, since they are bound to receive

---

[55] TEX. R. APP. P. 33.1(a)(1)(A).

[56] *Dewberry v. State*, 4 S.W.3d 735, 740-41 (Tex. Crim. App. 1999); *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993).

[57] 753 S.W.2d 688, 695 (Tex. Crim. App. 1988).

> the law from the trial judge. All evidence which the trial judge has ruled admissible may therefore be weighed and considered by the jury, and a reviewing court is obliged to assess the jury's factual findings from this perspective.

We see no reason why this rule should be different for a factual sufficiency review. Because Shisinday does not claim that the evidence is insufficient to support his conviction when all the evidence is taken into account, we need not address this claim. Shisinday's fiftieth point of error is overruled.

Improper Jury Argument

In his twenty-third and twenty-fourth points of error, Shisinday contends that the State improperly commented on Shisinday's failure to testify. Specifically, Shisinday refers to the following argument by the prosecutor:

> They talk about where is the ballistics evidence from the gun when you know from the statement, the uncontradicted statement of the defendant, that after all of this happened he went –
>
> DEFENSE: Object to being a comment on the defendant's failure to testify.
>
> THE COURT: Sustain your objection.
>
> STATE: When I say the uncontradicted that means there has not been in any statement as to anything of what is meant –

> DEFENSE: Further object. Another comment on the defendant's failure to testify.

The court sustained the objection, granted defense counsel's request to disregard the prosecutor's last comment, and overruled the request for mistrial.

A comment upon a defendant's failure to testify violates the Fifth Amendment of the United States Constitution[58] and Article 38.08. A prosecutor's comment will be found to violate the accused's right to silence if it is of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify.[59] An argument comments on the defendant's failure to testify if the defendant's testimony would be the only method of rebutting the evidence the prosecutor argues is uncontroverted.[60]

Here, defense counsel cut off the prosecutor before he could articulate what the uncontroverted testimony was. It is not possible to determine from the record, therefore, whether Shisinday's testimony would have been the only source of rebutting evidence. Therefore, because the argument did not direct the jury's attention to any specific uncontroverted evidence, there was no comment on his failure to testify. Additionally, the court's instruction to disregard was

---

[58] *Griffin v. California*, 380 U.S. 609, 615 (1965).

[59] *See Griffin*, 380 U.S. at 613-614; *Ramos v. State*, 419 S.W.2d 359, 367 (Tex. Crim. App. 1967) (citing *Davis v. United States*, 357 F.2d 438 (5th Cir. 1966), *cert. denied*, 385 U.S. 927 (1966); *Johnson v. State*, 611 S.W.2d 649, 650 (Tex. Crim. App. 1981).

[60] *See Myers v. State*, 573 S.W.2d 19, 20-21(Tex. Crim. App. [Panel Op.] 1978).

sufficient to cure any error.[61] Shisinday's twenty-third and twenty-fourth points of error are overruled.

Shisinday argues in his twenty-sixth point of error that the State went beyond the scope of permissible jury argument. During final argument, the State suggested that Shisinday's mother may have moved the pistol:

> STATE: And you know why wasn't the gun back in the armrest? Who was the last person to have driven that car? The defendant's mother . . . Maybe she took it out of where it always was and he always keeps it back there under that armrest and put it under the carpet. I don't know.
>
> DEFENDANT: Objection, Your Honor. Way outside the record.
>
> STATE: Reasonable deduction.
>
> COURT: Ladies and gentlemen, the lawyers' argument [*sic*] are not evidence. You may draw deductions.

To preserve a question for appellate review, the complaining party must obtain an adverse ruling from the trial court.[62] An ambiguous response, such as "the jury will recall

---

[61] *See Moore v. State*, 999 S.W.2d 385, 405 (Tex. Crim. App. 1999), *cert. denied*, 530 U.S. 1216 (2000); *Smith v. State*, 919 S.W.2d 96 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1030; *Jackson v. State*, 745 S.W.2d 4,13-15 (Tex. Crim. App. 1988); *cert. denied*, 487 U.S. 1241 (1988).

[62] TEX. R. APP. P. 33.1(a)(2).

the evidence," is not a ruling on the objection and is insufficient to preserve error.[63] Shisinday did not preserve this point for review. Point of error twenty-six is overruled.

Charge Error

In his ninth point of error, Shisinday argues that he was entitled to an instruction under Article 38.23 because of the conflicting facts regarding admissibility of the items seized as a result of his statement and search of his car. Article 38.23(a) provides that in "any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained." Citing to *Atkinson v. State*,[64] Shisinday argues that the trial court must submit such an instruction to the jury when the facts surrounding the legality of how the evidence was obtained conflict. Shisinday states that he timely requested a charge, directing us to the following record cite: "Exh. 31; SCR at 32-37." We presume that "Exh. 31" refers to exhibit 31. But State's exhibit 31 is a photograph of a doorway, and no defense exhibit 31 exists. Also, no such exhibit has been included with the briefs. At pages 32-37 of the Supplemental Clerk's record we find a *pro se* motion by Shisinday to impanel a special jury before trial to determine the voluntariness of his statement. The motion makes no mention of a jury charge or even of the items seized from Shisinday's car. The tables of contents of the clerk's record and supplemental clerk's record do not include a request for the jury instruction Shisinday now describes.

---

[63] *DeRusse v. State*, 579 S.W.2d 224 (Tex. Crim. App. 1979).

[64] 923 S.W.2d 21(Tex. Crim. App. 1996).

Because Shisinday's brief fails to provide record support demonstrating that he indeed made such a request and that the request sufficiently called the trial court's attention to the omission in the charge, we find this point inadequately briefed under Texas Rule of Appellate Procedure 38.1(h).[65] Shisinday's ninth point of error is overruled.

In his fifteenth point of error, Shisinday argues that his written statement established a mistake-of-fact defense; therefore the trial court erred in refusing to submit to the jury a mistake-of-fact instruction consistent with Section 8.02(a) of the Texas Penal Code. In support of his argument, he refers to the passage in his statement that he thought the victim was dead after Zendal Peels hit her with the gun because the blood was "coming down on her head." According to the statement, Zendal and Shisinday then removed the victim from her house and put her in the car. Shisinday argues that, if he believed the victim were dead, then he could not form the requisite intent to commit the underlying offense of kidnapping. But the following page of his statement belies this alleged mistake-of-fact defense. Shisinday goes on to explain that, while in the car, the victim regained consciousness several times and started to cry. Shisinday therefore must have known during the course of the kidnapping that she was still alive. Because the record does not support Shisinday's purported mistake-of-fact defense, the trial court did not err in refusing to submit the issue to the jury. Shisinday's fifteenth point of error is overruled.

Shisinday argues in his sixteenth and seventeenth points of error that the jury was improperly instructed regarding the law of parties in violation of his Fifth and

---

[65] *See Chapman v. State*, 921 S.W.2d 694, 695 (Tex. Crim. App. 1996).

Fourteenth Amendment due process rights. He contends that the State did not notify him of its intent to pursue a parties theory and that such a theory was neither included in the indictment nor developed at trial.

We have consistently held that "if the evidence supports a charge on the law of parties, the court may charge on the law of parties even though there is no such allegation in the indictment or information."[66] Further, when the evidence supports both primary and party theories of liability, the trial court does not err in submitting a parties instruction.[67] Here, the evidence established that both Zendal Peels and Shisinday were involved in kidnapping Harrison and disposing of her body. Therefore, the evidence supports a finding that Shisinday acted both as a principal and a party to Zendal's conduct.[68] Accordingly, the court did not err by including a parties instruction in the charge. Shisinday's sixteenth and seventeenth points of error are overruled.

Punishment

Insufficient Evidence

In his thirty-third point of error, Shisinday argues that the evidence was legally insufficient to support the jury's affirmative answers to the deliberateness and future

---

[66] *Tate v. State*, 811 S.W.2d 607, 607 n.3 (Tex. Crim. App. 1991); *see Rico v. State*, 707 S.W.2d 549, 551(Tex. Crim. App. 1983).

[67] *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1030 (1996).

[68] *See Cordova v. State*, 698 S.W.2d 107,111 (Tex. Crim. App. 1985), *cert. denied*, 476 U.S. 1101 (1986).

dangerousness special issues.[69] In his thirty-fourth point of error, he argues that the jury's negative answer to the mitigation special issue was "against the great weight of the evidence."[70]

Under the first punishment issue, the jury was asked "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased or another would result." The second special issue asked "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[71] The State had the burden of proving the punishment issues beyond a reasonable doubt.[72] In its determination of the issues, the jury was entitled to consider all of the evidence presented at both the guilt/innocence and punishment stages of trial.[73]

At the punishment phase, the State introduced several penitentiary packets with judgments showing Shisinday's 1973 Texas conviction and thirty-day sentence for aggravated assault of a police officer, 1974 Texas conviction and three-year sentence for impersonating an officer, 1974 Florida convictions for misdemeanor attempted grand larceny and misdemeanor petit larceny carrying sentences of four months

---

[69] *See* 37.0711, §§ 2(b).

[70] *See* 37.0711, §§ 2(e).

[71] Art. 37.0711, § 2(b)(1) and (2).

[72] Art. 37.0711, § 2(c).

[73] *Ladd v. State*, 3 S.W.3d 547, 557 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1070 (2000).

and sixty days respectively, and 1976 Louisiana convictions and two-and-a-half year sentences for "simple burglary" and attempted escape.

Dr. Kayla Paul, the psychologist who examined Shisinday on the day after the murder, testified that Shisinday's school records indicated that Shisinday had run away from home several times, had been involved in fights, used weapons, had been cruel to animals and people, and had set fires. She further testified that Shisinday came from a chaotic and abusive home environment.

Although Shisinday had worked for more than ten years in the prison garment factory, mostly without incident, he had lost work privileges for possession of contraband, threatening an officer, and disobeying an order.

We must view all of the evidence in the light most favorable to the jury's answers and then determine whether a rational jury could have found beyond a reasonable doubt that the answer to the first two punishment issues was "yes."[74]

Here, a rational jury could have found beyond a reasonable doubt that the circumstances of the crime alone were sufficient to support the jury's affirmative answers to the deliberateness and future dangerousness special issues.[75] Shisinday kidnapped a nineteen-year-old woman from her home, shot her point blank in the head, tied cinder blocks to her body, and dumped her in the river. To cover up the crime, Shisinday wiped away the footprints leading to the river,

---

[74] *Id.* at 558.

[75] *See Bell v. State*, 938 S.W.2d 35, 41-42 (Tex. Crim. App. 1996), *cert. denied*, 522 U.S. 827 (1997).

disposed of the victim's clothes and personal items in a dumpster, and washed the inside and outside of his car to remove the blood.

Further, Shisinday carried a loaded gun in his car and, on at least one occasion, did not hesitate to point it a police officer and at a friend. Shisinday's school records also demonstrated a history of misbehavior – bringing razor blades and knives to school, putting hot matches on children's arms, bringing baby birds to school and killing at least one of them, and slapping a school psychologist and then attacking him with a croquet mallet. Shisinday's antisocial tendencies continued as he committed several crimes in the seventies. Viewing the evidence in the light most favorable to the jury's affirmative answers to the special issues, we hold that a rational jury could have found beyond a reasonable doubt that Shisinday committed this crime deliberately and would commit future violent acts.

With respect to Shisinday's thirty-fourth point of error, this Court has stated that it will not conduct a sufficiency review of the jury's finding on the mitigation special issue because we leave this value judgment to the jury's discretion.[76] Shisinday's thirty-third and thirty-fourth points of error are overruled.

Improper Exclusion of Evidence

In his forty-fourth point of error, Shisinday argues that the trial court should have allowed him to introduce a police offense report explaining the context of his conviction for "aggravated assault on a police officer." What is referred to as Defense Exhibit 13 in the trial record was never offered at

---

[76] *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999).

trial and was not included in the appellate record for this Court's review. Therefore, nothing is presented for our review.[77]

Shisinday's forty-fourth point of error is overruled. Shisinday complains in his forty-fifth point of error that the trial court would not permit him to introduce various statistical studies regarding the recidivism of capital offenders. The trial judge allowed Shisinday to discuss the results of several other statistical studies. But the judge excluded all of the studies of offenders who were sentenced to death before 1972. Before 1972 an array of offenses were punishable by death, including all murder offenses,[78] kidnapping for extortion,[79] rape,[80] and armed robbery.[81] The trial judge excluded these studies because they were irrelevant and the danger of confusing the issues would outweigh the probative value.

There was no testimony showing that these statistics related to some individual characteristic of Shisinday. General testimony regarding recidivism that is not shown to be relevant to an individual defendant is subject to exclusion.[82] The trial court did not abuse its discretion in not

---

[77] *See* TEX. R. APP. P. 33.1(a); *Stewart v. State*, 686 S.W.2d 118, 122 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 866 (1985).

[78] TEX. PEN. CODE art. 1257 (1925) (repealed 1974).

[79] TEX. PEN. CODE art. 1177a (1925) (repealed 1974).

[80] TEX. PEN. CODE art. 1189 (1925) (repealed 1974).

[81] TEX. PEN. CODE art. 1408-(1925) (repealed 1974).

[82] *See Mosley v. State*, 983 S.W.2d 249, 265-66 (Tex. Crim. App. 1998), *cert. denied*, 526 U.S. 1070 (1999).

allowing testimony on these statistics. Shisinday's forty-fifth point of error is overruled.

Improper Admission of Evidence

In his forty-first through forty-third points of error, Shisinday argues that the trial court erroneously admitted his prior convictions admitted through Exhibits 120, 103, 105 and 106. He first argues that these judgments did not show that he had counsel or waived a jury trial.[83]

In a collateral attack on the judgment of a prior conviction, the burden is on the attacking party to show that the complete records of the cause were silent as to jury waiver or that the state in which the judgment was instated required jury waiver to be reflected on the face of the judgment.[84] Shisinday failed to meet this burden. He also failed to show that he was without counsel in the prior proceedings.[85] In fact, all of the exhibits indicate that Shisinday did have counsel.

Shisinday next contends that the trial judge should have excluded the exhibits under Rule of Evidence 403 because their probative value was substantially outweighed by the danger of unfair prejudice. Specifically, Shisinday argues that the offenses had no probative value because they were at least 20 years old and they involved non-violent

---

[83] Citing *Boykin v. Alabama*, 395 U.S. 238 (1969).

[84] *See West v. State*, 720 S.W.2d 511, 519 (Tex. Crim. App. 1986) (plurality op.), *cert. denied*, 481 U.S. 1072 (1987).

[85] *See Disheroon v. State*, 687 S.W.2d 332, 334 (1985); *Acosta v. State*, 650 S.W.2d 827, 828 (1985); Maddox v. State, 591 S.W.2d 898, 903 (1979), *cert. denied*, 447 U.S. 909 (1980).

conduct. But under Rule 403 Shisinday must show that the danger of unfair prejudice outweighs the probative value.[86] "Unfair prejudice" refers to "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[87] Shisinday has not explained how the jury would improperly consider the prior offenses. Although the convictions were at least 20 years old, Shisinday had been in prison for at least 16 of those years. Additionally, the "the law places no remoteness limitations on past convictions offered to show the prior criminal record of an accused."[88] Remoteness limitations apply only to convictions introduced for impeachment purposes.[89] Even though the offenses were non-violent, they were relevant to show Shisinday's past criminal history.[90]

Lastly, Shisinday argues that Exhibit 105 was inadmissible because it contained hearsay. Although he objected on hearsay grounds at trial, Shisinday did not get a ruling from the judge. The judge ruled only on whether this exhibit was excluded under Rule 403. Shisinday has not

---

[86] *See Rogers v. State*, 991 S.W.2d 263, 266 (Tex. Crim. App. 1999); *Cohn v. State*, 849 S.W.2d 817, 820 (Tex. Cr. App. 1993).

[87] *Cohn*, 849 S.W.2d at 820 (citing 1 Steven Goode et al, *Texas Practice: Guide to the Texas Rules of Evidence: Civil and Criminal* § 403.2, at 93 (2d ed. 1993)).

[88] *Mendoza v. State*, 552 S.W.2d 444, 449 (Tex. Crim. App. 1977).

[89] *Id.*

[90] TEX. CRIM. PROC. CODE art. 37.071 § 2.

preserved this point for review.[91] Points of error forty-one through forty-three are overruled.

Prosecutorial Misconduct

In his twenty-fifth point of error, Shisinday contends that the State's improper question of defense witness Dr. Sarmiento violated his Fifth Amendment right to remain silent and Sixth Amendment right to a jury trial. During its punishment-phase case, the defense elicited testimony from Dr. Sarmiento that, just after the offense in 1981, Shisinday had diverted the blame for Harrison's death but that Shisinday had changed over the years. During the direct examination of Sarmiento the following occurred:

> Q: Have you seen any signs of remorse in Mr. Thomas?
>
> A: Yes.
>
> Q: In what way?
>
> A: Well, when I saw him before he said that he was sad that the girl had died but that he didn't really take any real responsibility for that. He blamed Zendal. He blamed the police. He blamed his parents. He blamed society.
>
> And now I think he's really come to realize that he's responsible for his own actions and really to understand why it is wrong to do that . . . . So he understood that

[91] *See* TEX. R. APP. P. 33.1(a)(2).

> that is why it is wrong to do things, to do something like that because of the pain it caused, which is actually a very high level of moral development to understand kind of the principle behind right. and wrong, not just the fact that it is wrong but understand why with respect to how it affects other people and so on.

On cross-examination, the prosecution pursued the following line of questioning:

> A: Well, Doctor, on that last point are you saying the defendant has indicated to you that he's responsible for the death of Miss Harrison and accepts the fact that he's the one that caused her death during the kidnapping?
>
> A. Yes.
>
> Q. Then why would he have plead [*sic*] not guilty?
>
> A. Well–
>
> DEFENSE COUNSEL: Objection, Your Honor. That calls for a comment on the defendant's–
>
> THE COURT: Sustain the objection.
>
> STATE: No, it does not.
>
> DEFENSE COUNSEL: – right to a trial by jury. His Fifth Amendment.

THE COURT: Sustain the objection.

DEFENSE COUNSEL: Ask for a jury instruction.

THE COURT: The jury is to disregard the last question of the Prosecutor.

DEFENSE COUNSEL: Move for a mistrial.

THE COURT: Denied.

PROSECUTOR: Well, under what form did this taking of responsibility take?

Shisinday argues that the question "then why would he have plead [*sic*] not guilty?" violated his right to remain silent. A comment upon a defendant's silence violates the Fifth Amendment of the United States Constitution[92] and Article 38.08. Shisinday also contends that this comment violated his right to a jury trial. A defendant has a Fifth Amendment right to plead not guilty[93] and Sixth Amendment right to a jury determination of guilt.[94]

The State responds by claiming that this question was "invited." Once Shisinday presented psychiatric testimony that he was remorseful and accepted responsibility for his actions, the State argues that the prosecutor was entitled to determine how Shisinday had manifested his willingness to accept responsibility. According to the State, an acceptable

---

[92] *Griffin v. California*, 380 U.S. 609, 615 (1965).

[93] *See Brady v. United States*, 397 U.S. 742, 748 (1970).

[94] *See Apprendi v. New Jersey*, 530 U.S. 466 (2000).

way of challenging how Shisinday was accepting and remorseful for his actions was to ask why he plead not guilty.

In *United States v. Robinson*,[95] the Supreme Court discussed the concept of invited error. In that case defense counsel urged several times during closing that the State had not allowed Robinson to explain his side of the story.[96] The State argued that this argument "opened the door" to commenting on Robinson's failure to testify and in rebuttal summation remarked that Robinson "could have taken the stand and explained it. . . ." The Supreme Court held that there was no Fifth Amendment violation of self-incrimination because the comment was a fair response to Robinson's argument. Explaining *Griffin v. California*,[97] the Court said that the Fifth Amendment "prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt."[98] The privilege is violated where a prosecutor on his own asks the jury to draw adverse inferences from a defendant's silence.[99] But when a prosecutor's reference is a fair response to a claim made by the defendant or his counsel, there is no violation.[100] We have also consistently held that the defense can open the door

---

[95] 485 U.S. 25 (1988).

[96] *Id.* at 32-33.

[97] 380 U.S. at 614-15.

[98] *Robinson*, 485 U.S. at 32-33; *see also Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976); *Lakeside v. Oregon*, 435 U.S. 333, 338 (1978).

[99] *Robinson*, 485 U.S. at 33.

[100] *Id.*

to comments on the failure to testify.[101] But counsel is not permitted to go outside the scope of the invitation.[102]

In this case we find that the prosecutor went outside the invitation. While Shisinday did initially open the door to whether he was remorseful and accepting of his actions, attacking the sincerity of these convictions by asking why he pled not guilty went too far. In *Lopez v. State*,[103] this Court found error was committed when the prosecutor argued the defendants had lied when they entered pleas of not guilty. A defendant has an absolute right to plead not guilty. A plea of not guilty is a denial of every material allegation in the indictment,[104] and upon such a plea, the State bears the burden of proving the defendant's guilt beyond a reasonable doubt.[105] There are no summary determinations of guilt; even in the face of a plea of guilty, the State must still offer evidence of guilt.[106] There are numerous reasons and strategic decisions that go into a defendant's decision to plead

---

[101] *See Long v. State*, 823 S.W.2d 259, 269 (Tex. Crim. App. 1992); *Allen v. State*, 693 S.W.2d 380, 385-86 (Tex. Crim. App. 1985); *Nethery v. State*, 692 S.W.2d 686, 703 (Tex. Crim. App. 1985), *cert. denied* 474 U.S. 1110 (1986); *Broussard v. State*, 505 S.W.2d 282, 285-86 (Tex. Crim. App. 1974).

[102] *Wilson v. State*, 938 S.W.2d 157, 161 (Tex. Crim. App. 1996); *Johnson v. State*, 611 S.W.2d, 649, 650 (Tex. Crim. App. 1981); *Franks v. State*, 574 S.W.2d 124, 126 (Tex. Crim. App. 1978).

[103] 500 S.W.2d 844, 845 (Tex. Crim. App. 1973).

[104] Art. 27.17.

[105] *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

[106] Art. 1.15.

not guilty that may have nothing to do with whether the defendant accepted responsibility for his actions. We find that it was manifestly improper for the prosecutor to ask why Shisinday decided to plead not guilty.

But although the question was improper, we find the court's instruction to disregard cured any error. Any injury from an improper comment is obviated when the court instructs the jury to disregard, unless the remark is so inflammatory that its prejudicial effect cannot reasonably be removed by such an admonishment.[107] As we explained in *Waldo v. State*:

> . . . the . . . presumption that an instruction [to disregard] generally will not cure . . . has been eroded to the point that it applies only to the most blatant examples. Otherwise, the Court has tended to find the instruction to have force . . . . Even where we have found such comment beyond cure, the Court has nevertheless held it can constitute harmless error in context of the particular case.[108]

In *Moore v. State*, the defense had put on a psychologist that testified to responses Moore gave during a psychological test.[109] The prosecutor asked how many of the

---

[107] *McKay v. State*, 707 S.W.2d 23, 35 (Tex. Crim. App. 1985); *Logan v. State*, 698 S.W.2d 680, 682 (Tex. Crim. App. 1985).

[108] 746 S.W.2d 750, 753 (Tex. Crim. App. 1988); *see Dinkins v. State*, 894 S.W.2d 330, 356 (Tex. Crim. App. 1995); *Jones v. State*, 693 S.W.2d 406, 408-409 (Tex. Crim. App. 1985).

[109] 999 S.W.2d 385, 405 (Tex. Crim. App. 1999), *cert. denied*, 530 U.S. 1216 (2000).

175 questions the witness was going to testify to – the prosecutor said that these were answers the defendant have given, "which he can testify to."[110] There was an objection and an instruction to disregard the prosecutor's comment.[111] We held that the comment was not so blatant as to render the instruction to disregard ineffective.[112] In *Hawkins v. State*, the prosecutor made a remark regarding a lack of any showing of remorse by Hawkins during the trial.[113] This Court found that the trial court's instruction to disregard was sufficient to cure any error.[114] We reach the same conclusion in this case. Our examination of the trial record fails to demonstrate that the prosecutor's isolated comment during the punishment phase, which was immediately followed by an admonishment to disregard, was so prejudicial that it could not be cured. The comme did not reveal to the jury any prejudicial information th was not already aware of. Shisinday's twenty-fifth poir of error is overruled.

---

[110] *Id.*

[111] *Id.*

[112] *Id at 406.*

[113] 660 S.W.2d 65, 79 (Tex. Crim. App. 1983).

[114] *Id.*; *see also Dinkins v. State*, 894 S.W.2d 330, 355-56 (Tex. Crim. App. 1995), *cert. denied*, 516 U.S. 832 (1995); *Long v. State*, 823 S.W.2d 259, 269-70 (Tex. Crim. App. 1991), *cert. denied*, 505 U.S. 1224 (1992); *Caldwell v. State*, 818 S.W.2d 790, 799-801(Tex. Crim. App. 1991), *overruled on other grounds*, *Castillo v. State*, 913 S.W.2d 529 (Tex. Crim. App. 1995); *Bower v. State*, 769 S.W.2d 887, 906 (Tex. Crim. App. 1989), *overruled on other grounds*, *Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991).

In points of error twenty-seven through twenty-nine, Shisinday argues that the State went beyond the scope of permissible jury argument. During the punishment closing arguments the State argued:

> I submit to you that he and Zendal were in it together. Whatever happened to Sylvia Elaine Harrison in that bedroom, whatever happened to her in that house I submit to you that they were in it together. And I don't have any doubt, I think the evidence is probably pretty clear, that there was some sort of rape involved because if not some sort of rape-
>
> DEFENSE: Objection, Your Honor. Outside the record.
>
> THE COURT: Ladies and gentleman, you will recall the evidence. The lawyers' arguments are not evidence.

To preserve a question for appellate review, the complaining party must obtain an adverse ruling from the trial court.[115] Shisinday did not preserve these points of error for review.[116] Points of error twenty-seven through twenty-nine are overruled.

---

[115] TEX. R. APP. P. 33.1(a)(2).

[116] *See* discussion *supra* of appellant's twenty-sixth point of error.

Charge Error

In his forty-sixth point of error, Shisinday alleges that the court erroneously denied his request for an Article 8.04 instruction concerning intoxication. This complaint was not made to the trial court, therefore this point is waived.[117] A trial court has no duty to *sua sponte* instruct a jury on an unrequested defensive theory.[118] Shisinday's forty-sixth point of error is overruled.

Jury Deliberations

Shisinday contends in his thirty-second point of error that the court coerced the jury into voting for the death penalty by repeatedly instructing it to deliberate despite notes that it could not agree on Special Issue Number Three. A trial court in its discretion may discharge a jury where it has been kept together for such time as to render it altogether improbable that it can agree.[119]

The jury began deliberating at 12:30 p.m. on November 19, 1998. Around 5:45 p.m. the jury sent out a note stating: "[w]e have not reached a conclusion. We believe it will be some time before we work this out – which we believe we will."

On November 20, 1998 at 10:06 a.m., the jury requested some of Shisinday's psychiatric and school reports. At 11:56 a.m. the jury issued a note indicating that it was

---

[117] TEX. R. APP. P. 33.1(a)(1).

[118] *Posey v. State*, 966 S.W.2d 57, 63 (Tex. Crim. App. 1998).

[119] Art. 36.31; *Howard v. State*, 941 S.W.2d 102 (Tex. Crim. App. 1996).

unable to agree on Special Issue Number Three and "there seems little hope of any movement on individual juror's positions." At this time, Shisinday moved for a mistrial which was denied. The jury's note did not indicate that it was at an impasse but only that there was "little hope."[120] The night before the jury had indicated that it believed that it could work it out, and that it had just requested more information before sending this note. So, there were significant indications that the jury was still deliberating. The trial court did not abuse its discretion in denying Shisinday's first motion.

Later that day at 3:45 p.m., the jury requested exhibits containing Shisinday's prior conviction judgments. At 4:20 the jury issued a note:

> [w]e the jury remain at the same 9-3 vote. The 3 haven't changed since yesterday, and they insist they will not change. The 9 haven't changed, and they insist they will not change. Continued deliberations are futile.

Following this note, Shisinday's second motion for mistrial was denied. About an hour and a half later the jury explained, "[o]f the 3 votes, 1 has repeated that he will not consider any change 'for all of eternity.' The other 2 are holding firm." Shisinday again moved for a mistrial which was denied.

The trial court is not constrained to enter a life sentence after the first sign of juror impasse, but may do so if in its discretion it determines that the jury has been together for such a time as to render it improbable that they can

---

[120] *C.f. Howard v. State*, 941 S.W.2d at 122.

agree.[121] The jury had only been deliberating for a little more than a day, evaluating the testimony of over 35 witnesses and more than 120 exhibits. The trial court did not abuse its discretion in overruling the motion for mistrial.[122]

The next day at 10:04 a.m. the jury showed that it was making progress when it issued the following note:

> [o]ur vote is 10 'no' and 2 'yes.' Of the 'yes' votes, one continues to insist that no argument or discussion will change his position. The 10 'no' votes are firm.

Shisinday again moved for a mistrial. The judge denied the motion and noted that "there had been some change since yesterday evening with respect to the vote in the jury room." In gaining one more "no" vote, the jury did appear to be making deliberative progress.[123] Once again, the trial court was within its discretion in denying Shisinday's motion for mistrial.

The jury continued to deliberate and the following morning it requested five exhibits and testimony regarding where the victim bit Shisinday. At 9:45 a.m. the jury notified the court that it had reached a unanimous verdict.

Considering the length of the trial, number of exhibits, and notes from the jury indicating that they were continuing to deliberate, we hold that the trial court did not abuse its

---

[121] *Id.* at 121.

[122] *See id.* at 121-22.

[123] *See id.* at 122.

discretion in overruling Shisinday's motions four a mistrial. His thirty-second point of error is overruled.

Post-Trial

Sentencing Statute Unconstitutional

In point forty-seven, Shisinday argues that the prohibition against informing the jury of the consequences of its failure to reach an agreement on the mitigation special issues renders Article 37.0711 unconstitutional. This Court has heard and rejected this argument on numerous occasions.[124] Point of error forty-seven is overruled.

Denial of Effective Counsel

In his thirty-fifth point of error, Shisinday contends that articles 1.051 and 26.04, which provide for appointment of counsel to indigent defendants, deprived him of his right to the effective assistance of counsel guaranteed by the Sixth Amendment. Specifically, he contends that the undefined terms "represent" and "assistance" in the statutes somehow denied him the constitutional role of the advocate and assistant. Shisinday has not demonstrated that the Texas courts are applying articles 1.051 and 26.04 in a manner calculated to strip a defendant of his constitutional right to the effective assistance of counsel.

---

[124] *See Raby v. State*, 970 S.W.2d 1, 7 (Tex. Crim. App. 1998), *cert. denied*, 525 U.S. 1003 (1998); *Morris v. State*, 940 S.W.2d 610, 614-15 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1278 (1997); *Rousseau v. State*, 855 S.W.2d 666, 686-87 (Tex. Crim. App. 1993), *cert. denied*, 510 U.S. 919 (1993); *Draughon v. State*, 831 S.W.2d 331, 337 (Tex. Crim. App. 1992), *cert. denied*, 509 U.S. 926 (1993); *Davis v. State*, 782 S.W.2d 211, 221-22 (Tex. Crim. App. 1989), *cert. denied*, 495 U.S. 940 (1990).

Except in extraordinary cases in which a defendant is completely denied counsel at a critical stage of trial, there is generally no basis for finding a Sixth Amendment violation unless the defendant shows how counsel's specific errors undermined the trial.[125] Shisinday has not alleged that the challenged statutes completely denied him counsel; therefore, he must demonstrate that his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and that counsel's deficient performance resulted in a conviction that was unreliable.[126] A general attack on the statutes that merely administrate how and when counsel will be appointed is insufficient to prove that Shisinday was denied his Sixth Amendment right to effective representation. Shisinday's thirty-fifth point of error is overruled.

Cruel and Unusual Punishment

In his forty-ninth point of error, Shisinday contends that his incarceration on death row for eighteen years subjected him to cruel and unusual punishment. We have rejected similar arguments.[127] Shisinday has not alleged that any delays in his case have been due to State tactics designed to prolong his wait and thereby increase his suffering. Any delays have resulted from Shisinday's legitimate entitlement to the benefits of review of his conviction and death sentence and have been necessary to ensure that his conviction and

---

[125] *See United States v. Cronic*, 466 U.S. 648, 659 (1984).

[126] *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[127] *See Janecka v. State*, 937 S.W.2d 456, 476 (Tex. Crim. App. 1996), *cert. denied*, 522 U.S. 825 (1997); *Bell v. State*, 938 S.W.2d 35, 53 (Tex. Crim. App. 1996), *cert. denied*, 522 U.S. 827 (1997).

sentence are proper.[128] Shisinday's forty-ninth point of error is overruled.

Excessive Punishment

Shisinday argues in his fifty-first point of error that the Eighth Amendment prohibits imposition of a death sentence because it is disproportionate to the punishment imposed on his accomplice, Zendal Peels. The United States Supreme Court has held the Eighth Amendment, applicable to the states through the Fourteenth Amendment, does not require a proportionality review in death penalty cases.[129] We have repeatedly reaffirmed the holding in *Pulley*.[130] Point of error fifty-one is overruled.

---

[128] *See id.*

[129] *Pulley v. Harris*, 465 U.S. 37 (1984).

[130] *See Pondexter v. State*, 942 S.W.2d 577 (Tex. Crim. App. 1996); *Morris v. State*, 940 S.W.2d at 615; *Anderson v. State*, 932 S.W.2d 502, 508-509 (Tex. Crim. App. 1996), *cert. denied*, 521 U.S. 1122 (1997); *Hughes v. State*, 897 S.W.2d 285, 294 (Tex. Crim. App. 1994).

Finding no reversible error, we affirm the judgment of the trial court.

DATE DELIVERED: September 12, 2001

DO NOT PUBLISH

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 73,351

SHOZDIJIJI SHISINDAY (a.k.a. Danny Dean Thomas),
Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL
FROM HARRIS COUNTY

WOMACK, J., filed a concurring opinion.

I join the judgment of the Court and its opinion, except as to the following points of error:

If the Court's statement that the appellant's "first death sentence was not carried out so he has not been punished twice for this crime" *(ante* at 8) means that the eighteen years of incarceration was not punishment, I do not agree. I do agree that this retrial does not twice place him in jeopardy.

I do not agree with the Court's statement that the late Mr. Belamy's testimony about the appellant's disoriented demeanor the day after the offense would have been

"cumulative or immaterial," *ante* at 11. I do agree that there was no denial of due process.

Along the same lines, I do not agree that Gilliam's testimony about selling the appellant the murder weapon was "cumulative," *ante* at 33. There was other evidence about the gun's being the murder weapon, but none about its being acquired by sale from Gilliam. I do agree that the error was harmless beyond a reasonable doubt.

I am leery of the statement, "Generally, a photograph is admissible if verbal testimony as to matters depicted in the photographs is also admissible," *ante* at 37-38. I agree that there was no error in admitting these photographs.

I have elsewhere published my disagreement with the statement, "A trial court has no duty to *sua sponte* instruct a jury on an unrequested defensive theory," *ante* at 62. *See Posey v. State*, 966 S.W.2d 57, 66 (Tex. Cr. App. 1998) (Womack, J., concurring). Our law expressly provides that "the judge shall deliver to the jury ... a written charge distinctly setting forth the law applicable to the case,"[1] and that "[w]henever it appears by the record in any criminal action upon appeal that [this or] any requirement ... has been disregarded, the judgment shall not be reversed ... unless it appears from the record that the defendant has not had a fair and impartial trial."[2] If there was evidence of intoxication

---

[1] TEX. CODE CRIM. PROC. art. 36.14.

[2] *Id.*, art. 36.19. *See Almanza v. State*, 686 S.W.2d 157, 172 (Tex. Cr. App. 1985) (such a failure is "[a]n independent basis for reversal [that] arises if the error, even though not timely objected to, is so egregious and creates such harm that it deprives the accused of a 'fair and impartial trial'").

that would have warranted the charge, the proper holding would be to affirm the judgment because the omission of the charge did not deny the appellant a fair and impartial trial.

En banc.
Delivered September 12, 2001.
Do Not Publish.

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 73,351

SHOZDIJIJI SHISINDAY (a.k.a. Danny Dean Thomas), Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM HARRIS COUNTY

Johnson, J., *filed a dissenting opinion.*

DISSENTING OPINION

Judge Womack has filed a concurring opinion in which he raises some concerns about the language used by the majority opinion in some of the points of error. *Ante*, at ____ (slip op. at 1-2) (Womack, J., concurring). I agree with Judge Womack as to those points of error, but do not join him.

While I agree with the majority that appellant's competence at the time of trial has no bearing on whether he was legally insane at the time of the offense, I do not agree that appellant's demeanor at trial has no relevance to his presentation of an insanity defense. *See ante*, at ____ (slip

op. at 9-10). Juries tend to be skeptical of the defense of insanity. A defendant who is receiving medication appropriate to his condition will appear "normal" to a jury, thus increasing its skepticism. The distinction between "competent to stand trial" and "legally insane at the time of the offense" can easily escape jurors, especially because the definition of "legally insane" is so narrow and very different from what "insane" means to a non-lawyer. In this case, however, appellant was able, as his own reply brief states, to present to the jury "an enormous amount of evidence" concerning his mental illness and its implication as to his sanity at the time of the offense. His forced medication at the first trial did not, therefore, prevent him from adequately presenting his insanity defense at the second trial.

In his twenty-fifth point of error, appellant alleges prosecutorial misconduct because of the prosecutor's question to Dr. Sarmiento about appellant's entry of a plea of not guilty. *Ante*, at – (slip op. at 55). The majority analyzes this point of error as "invited error." *Id.* at ___ (slip op. at 58). I disagree that there was any defense "invitation" to error, and, while the prompt action of the trial court in sustaining appellant's objection and instructing the jury to disregard the question may have tempered the effect of the error, it did not cure the error.

One of the issues before the jury at the punishment hearing in a capital case is whether the defendant is remorseful; lack of remorse is frequently a prominent topic for discussion by the state in final arguments. *See, e.g., Dewberry v. State*, 4 S.W.3d 735, 743 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1131, 120 S. Ct. 2008, 146 L. Ed. 2d 958 (2000); *Trevino v. State*, 991 S.W.2d 849, 854 (Tex. Crim. App. 1999); *Rachal v. State*, 917 S.W.2d 799, 806 (Tex. Crim. App.), *cert. denied*, 519 U.S. 1043, 117 S.

Ct. 614, 136 L. Ed. 2d 539 (1996); *Heiselbetz v. State*, 906 S.W.2d 500, 507-8 (Tex. Crim. App. 1995). Presentation of evidence of remorse by the defendant during the punishment hearing is not an invitation to comment on the defendant's constitutional and statutory right to a trial by jury on a plea of not guilty, regardless of obviousness of guilt. This is especially true in the context of a capital offense. Article 1.14(a) of the Texas Code of Criminal Procedure states that a defendant may waive any right, *except* that "a defendant in a capital felony may waive the right of trial by jury only in the manner permitted by Article 1.13(b) of this code." Article 1.13(b) states: "In a capital felony case in which the attorney representing the State notifies the court and the defendant that it *will not seek the death penalty*, the defendant may waive the right to trial by jury but *only if the attorney representing the State*, in writing and in open court, *consents to the waiver*." (Emphasis added.) By the plain language of the statute, a defendant in a capital case may plead guilty only with consent of the state and, even with the state's consent, only in a case in which the state has chosen not to seek the death penalty. The state is in total control of whether a defendant has even an option to plead guilty. Here, the state sought the death penalty, thereby barring appellant from pleading guilty. For the state to preclude appellant from pleading guilty and then to imply in front of the jury that appellant could have and should have so plead is egregious prosecutorial misconduct. The error was preserved by a timely objection pursued to an adverse ruling. Because the prosecutor's comments violated appellant's rights under the Fifth and Sixth Amendments to the United States Constitution, the judgment must be reversed unless we determine "beyond a reasonable doubt that the error did not contribute to the . . . punishment." TEX. R. APP. P. 44.2(a). Given this heavy burden; as well as the blatancy of the remark

made by the prosecutor,[1] I cannot say beyond a reasonable doubt that the error did not harm appellant.

---

[1] As the majority notes, our case law indicates that a court's instruction to disregard such an error is insufficient when the comment is "blatant" or "inflammatory." *Ante*, at ___ (slip op. at 59-60). However, I believe that the majority errs in concluding that the error in the instant case is no more "blatant" than those in *Moore v. State*, 999 S.W.2d 385 (Tex. Crim. App. 1999), *cert denied*, 530 U.S. 1216, 120 S. Ct. 2220, 147 L. Ed. 2d 252 (2000), and *Hawkins v. State*, 660 S.W.2d 65 (Tex. Crim. App. 1983). In *Moore*, a doctor was in the process of testifying as to answers previously given by the defendant in response to questions by the doctor. In attempting to limit this testimony, the prosecutor stated that these were "answers the defendant gave, which the defendant can testify to." we found that the court's instruction to disregard was sufficient to cure the error because the prosecutor's comment "was intended to prevent the witness from serving as a conduit through which appellant could testify without taking the stand" and because the comment was directed to the court, although it was made in front of the jury. *Moore*, 999 S.W.2d at 405-6. In *Hawkins*, we determined that the comments made by the prosecutor "were not such that the jury would naturally and necessarily take them as comments upon appellant's failure to testify at trial." *Hawkins*, 660 S.W.2d at 78-9. In contrast, the comment made in the instant case was directed at the jury, and was so blatant and direct that it could be "naturally and necessarily" be taken only as a comment on appellant's right to remain silent and his right to a jury trial. Thus, *Moore* and *Hawkins* do not support the majority's conclusion that the error here was cured by the trial court's instruction to disregard.

For the reasons stated here, I would reverse and remand for a new punishment hearing.

Johnson, J.

Date Delivered: September 12, 2001

Do Not Publish

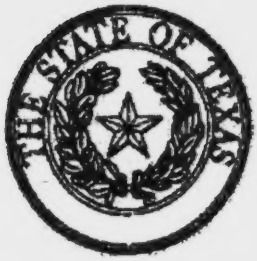
Appendix B

November 28, 2001 Docket Sheet of the

Texas Court of Criminal Appeals

Indicating Denial of Petitioner's

Motion for Rehearing



THE COURT OF CRIMINAL APPEALS OF TEXAS

NOVEMBER 28, 2001

THE FOLLOWING ORDERS ARE ENTERED AND OPINIONS HANDED DOWN:

73,817 RAY JASPER FROM BEXAR COUNTY
AFFIRMED-OPINION JUDGE MEYERS
(JUDGES WOMACK AND KEASLER CONCUR)
(JUDGE HERVEY NOT PARTICIPATING)
PUBLISHED OPINION

HABEAS CORPUS RELIEF GRANTED--OPINIONS BY THE COURT: (NON-PUBLISHED OPINIONS)

74,229 EX PARTE DETRICK DEROVEN FROM BEXAR COUNTY

74,230 EX PARTE RICHARD WARREN LAYMAN FROM COMAL COUNTY

74,231 EX PARTE RICARDO SALINAS FROM DALLAS COUNTY

74,232 EX PARTE DERRICK LAMAR SAM FROM HARRIS COUNTY

74,233 EX PARTE SHIRLEY WEBB KYLE FROM TARRANT COUNTY

74,234 EX PARTE SHIRLEY WEBB KYLE FROM TARRANT COUNTY

APPELLANT'S MOTION FOR REHEARING DENIED:

73,351 SHOZDIJIJI SHISINDAY FROM HARRIS COUNTY
(AKA DANNY DEAN THOMAS) (JUDGE JOHNSON WOULD GRANT)

ON APPELLANT'S PETITIONS FOR DISCRETIONARY REVIEW:

1856-00 TIREY GLEN SMITH SMITH COUNTY
12-99-00066-CR
JUDGMENT OF COURT OF APPEALS VACATED;
CAUSE REMANDED TO COURT OF APPEALS-
OPINION JUDGE KEASLER
PUBLISHED OPINION

ON STATE'S PETITIONS FOR DISCRETIONARY REVIEW:

1244-00 MILTON POWELL SABINE COUNTY
12-98-00049-CR
JUDGMENT OF COURT OF APPEALS REVERSED;
CAUSE REMANDED TO COURT OF APPEALS-
OPINION JUDGE HERVEY
(JUDGE MEYERS CONCURRED IN THE RESULT)
CONCURRING OPINION JUDGE PRICE

CONCURRING OPINION JUDGE JOHNSON
PUBLISHED OPINION

1753-01 ALAN WILLIAM WHITELAW HARRIS
COUNTY 14-98-00867-CR
STATE'S PETITION FOR DISCRETIONARY
REVIEW GRANTED;

Appendix C

Order of Federal District Judge Norman Black
dated July 2, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DANNY DEAN THOMAS,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	
GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,	§	CIVIL ACTION
	§	No. H-95-5236
	§	
	§	
	§	
	§	
Respondent.		

ORDER

This case remains before the Court on Petitioner's *Riggins* claim (Claim Three). He argues that, at the time of his trial, the State forcibly medicated him, against his will, with antipsychotic drugs and that the involuntary medication violated his constitutional rights. The parties agree that (1) Petitioner was involuntarily medicated with antipsychotic medication at trial, (2) that, at the time of Petitioner's trial, the State did not present evidence and the trial court did not make findings that could be said to satisfy the requirements of *Riggins v. Nevada*, 504 U.S. 127 (1992), and (3) the *Riggins* claim is not barred by the retroactivity doctrine enunciated in *Teague v. Lane*, 489 U.S. 288 (1989). The record is void of any attempt to justify the medication and the pleadings replete

with affidavits testifying to the adverse effect of the medication on Petitioner's demeanor at trial.

Petitioner argues that when the trial court fails to make the necessary findings, the defendant's conviction must be vacated. The Supreme Court addressed the possibility of making the findings to justify medication post-trial in *Riggins*. The Court stated that "[e]fforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion (to suspend administration of antipsychotic drugs) had been granted would be purely speculative." *Riggins*, 504 U.S. at 137. Furthermore, the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy, and there is no basis for saying that the substantial probability of trial prejudice in his case was justified.

The State argues that this Court may retrospectively make the *Riggins* findings. However, the State has not provided the Court with any cases supporting this course of action, nor is the Court aware of any justification for it.

Ronald Hayes, Petitioner's trial counsel, testified at the state habeas proceeding that he objected to Petitioner's continued medication prior to voir dire. The trial judge overruled the objection and ordered that the medication continue. In her findings of fact and conclusions of law on the state habeas petition, the trial judge stated that she is not a licensed medical doctor, and could neither order or prescribe medication for the applicant. However, the trial court allegedly ordered that Petitioner's medication be changed or the dosage increased in response to reports that Petitioner had been acting out in jail or had threatened to do so. The

medical testimony suggests that Petitioner's prescription could render a person sleepy or sluggish, and trial counsel testified that Petitioner appeared to sleep or feign sleep during trial. The record reflects that the jury was also aware of Petitioner's medication.

The record is void of any findings that support Petitioner's medication under *Riggins*. The Court declines to hold a hearing to determine if the prescription was medically appropriate, and considering less intrusive alternatives, essential for Petitioner's own safety or the safety of others. Testimony on what would or would not have been appropriate 15 years ago at Petitioner's trial would be at best speculative.

The parties submitted a joint motion for reconsideration of Petitioner's claim in light of *Lindh v. Murphy*, 1997 WL 338568 (U.S.) (June 23, 1997). *Lindh* is limited to non-capital habeas applications pending before the AEDPA was signed into law and has no applicability to the present case. The *Riggins* claim is reviewed under the standard laid out in the Court's Order entered May 7, 1997. A final order setting Petitioner's judgment of conviction aside consistent herewithin shall be issued this day.

Signed this 2nd day of July, 1997, at Houston, Texas.

/s/ Norman Black
Norman W. Black
United States District Judge

Appendix D

Relevant Constitutional

and

Statutory Provisions

AMENDMENT V TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him;* to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT VIII TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

Excessive bail shall not be required, *nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

VERNON'S TEXAS STATUTES AND CODES
ANNOTATED CODE OF CRIMINAL PROCEDURE

PART I—CODE OF CRIMINAL PROCEDURE OF 1965

TRIAL AND ITS INCIDENTS

CHAPTER THIRTY-SEVEN—THE VERDICT

Current through End of 2001 Reg. Sess.

Art. 37.0711. Procedure in capital case for offense committed before September 1, 1991

Sec. 1. This article applies to the sentencing procedure in a capital case for an offense that is committed before September 1, 1991, whether the sentencing procedure is part of the original trial of the offense, an award of a new trial for both the guilt or innocence stage and the punishment stage of the trial, or an award of a new trial only for the punishment stage of the trial. For the purposes of this section, an offense is committed before September 1, 1991, if every element of the offense occurs before that date.

Sec. 2. If a defendant is found guilty in a case in which the state does not seek the death penalty, the judge shall sentence the defendant to life imprisonment.

Sec. 3. (a)(1) If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(c) of this code, before the trial jury as soon as practicable. In the proceeding, evidence

may be presented as to any matter that the court deems relevant to sentence. This subdivision shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of this state. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) Notwithstanding Subdivision (1), evidence may not be offered by the state to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct.

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted under Subsection (b) of this section beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue submitted under Subsection (b) of this section "yes" unless it agrees unanimously; and

(2) it may not answer any issue submitted under Subsection (b) of this section "no" unless 10 or more jurors agree.

(e) The court shall instruct the jury that if the jury returns an affirmative finding on each issue submitted under Subsection (b) of this section, it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

(f) The court shall charge the jury that, in answering the issue submitted under Subsection (e) of this section, the jury:

(1) shall answer the issue "yes" or "no";

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree; and

(3) shall consider mitigating evidence that a juror might regard as reducing the defendant's moral blameworthiness.

(g) If the jury returns an affirmative finding on each issue submitted under Subsection (b) of this section and a negative finding on the issue submitted under Subsection (e) of this section, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under Subsection (b) of this section or an affirmative finding on the

issue submitted under Subsection (e) of this section or is unable to answer any issue submitted under Subsection (b) or (e) of this section, the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life.

(h) If a defendant is convicted of an offense under Section 19.03(a)(7), Penal Code, the court shall submit the issues under Subsections (b) and (e) of this section only with regard to the conduct of the defendant in murdering the deceased individual first named in the indictment.

(i) The court, the attorney for the state, or the attorney for the defendant may not inform a juror or prospective juror of the effect of failure of the jury to agree on an issue submitted under this article.

(j) The Court of Criminal Appeals shall automatically review a judgment of conviction and sentence of death not later than the 60th day after the date of certification by the sentencing court of the entire record, unless the Court of Criminal Appeals extends the time for an additional period not to exceed 30 days for good cause shown. Automatic review under this subsection has priority over all other cases before the Court of Criminal Appeals, and the court shall hear automatic reviews under rules adopted by the court for that purpose.

Appendix E

Objection to Gilliam Testimony

Trial Vol. 18, pgs. 91-102

THE COURT: Thank you, Major. You are excused.

Would you call your next witness, please.

MR. McCLELLAN: At this time, Your Honor, the State was going to offer into evidence a transcript from a previous proceeding, would offer into evidence a portion of Volume 26 marked as State's Exhibit No. 67 and tender to Defense Counsel for his examination.

MR. CORNELIUS: We will have a lengthy objection to that.

THE COURT: Ladies and gentlemen, let me ask you to retire to the jury room for just a moment, please while we discuss a legal matter.

(WHEREUPON, the following proceedings were had outside the presence and hearing of the jury:)

MR. CORNELIUS: We are proceeding outside the presence of the jury. It's been proffered that the testimony of Ernest Gilliam will be read to the jury by the District Attorney's Office.

My understanding is the witness is deceased. He testified at the previous trial for which that conviction was reversed, as the Court knows and it is established in this record.

We would object to the testimony being read for several reasons: First reason is this entire case was reversed on the Sixth Amendment issue based on the Riggins case concerning the defendant's lack of ability to cross-

examine, effectively participate in the cross-examination and the confrontation of the witnesses in the case because he was drugged or on drugs during the time of his trial.

We think that the State's attempt now to introduce before the jury selected portions of that prior testimony for which the entire case was reversed because the defendant wasn't able to properly cross-examine the witnesses or participate in their cross-examination or confront the witnesses, would constitute error in this case and would be, in our estimation, reversible error. That's Objection No. 1.

Objection No. 2 is because of the fact that the defendant wasn't able to participate in the proper confrontation and cross-examination of this witness at his first trial certain things were not developed.

I expect the evidence would show, if the testimony was allowed to be read, that this person sold a .25 caliber pistol to the defendant. I expect -- this is my speculation now, but for purposes of making my record now I expect that that is the reason the State is offering it, to put what the State, their theory is, the murder weapon in the hands of the defendant.

However, because the defendant wasn't allowed to properly cross-examine the witness at his trial because of being on drugs and now the witness is deceased we are not able to cross-examine the witnesses and develop the things that we need to develop if he were alive to show the true facts and circumstances concerning the purchase of this pistol and who the pistol was actually purchased for and the reason why the pistol was purchased. We can't do that because the witness is unavailable.

For these reasons we object to the reading of the testimony of Ernest Gilliam in the record.

One second.

(WHEREUPON, there was a conference between the Defense Attorneys outside the hearing of the court reporter.)

MR. CORNELIUS: Also because of the change in the law concerning Special Issue No. 3, this witness would have been a mitigating witness for the Defense, would be today if he were alive; but, because of the fact that couldn't be developed at the other trial we further object to the witness's testimony being read.

And further call the Court's attention that we filed a specific motion to dismiss this case, for this reason among others, that because we are denied the right to use this witness in the defense and feel like the Defense is not getting due process because it can't today, 17 years after the alleged commission of this offense, properly defend himself by calling this specific witness and others.

For all those reasons we would object to the State reading this to the jury.

THE COURT: Are you going to say something or just standing up?

MR. McCLELLAN: No.

THE COURT: Okay.

MR. McCLELLAN: The portion of the rules of evidence I think relating to this, what the Court is looking for, is 801(b) or something.

MS. WATERS: 804 (a) (b) (1) .

MR. McCLELLAN: 804 (a) (b) (1) .

THE COURT: Give me a minute.

Can I see it? Is that it?

MR. McCLELLAN: I am just showing the volume that it came out of.

THE COURT: Okay.

MR: McCLELLAN: And we have the death certificate.

All in one we have deleted references to "jury" and "trial." In one place back there in the certification by the court reporter says from the trial. So, we will delete that before it is given to the jury.

MR. CORNELIUS: Are you letting it in?

THE COURT: What?

MR. McCLELLAN: I am assuming.

MR. CORNELIUS: She hadn't ruled yet.

THE COURT: Do you have any other objections you want to make?

MR. McCLELLAN: Your Honor, as to State's Exhibit No. 67, we have made certain deletions in reference to places where it says "ladies and gentlemen of the jury" or references to "trial" or things of that nature.

I assume that the Defense does not object to our deleting those from State's Exhibit 67.

MR. CORNELIUS: We object to any reading, doesn't matter what's deleted or not deleted. We object to any reading of the deceased witness's testimony.

THE COURT: Okay. I understand, but not withstanding your previous objection, do you want it in or out?

MR. CORNELIUS: I am sorry. I don't mean to be difficult, but I am not going to go on the record saying anything that indicates in any way that we agree to anything of this being read.

MR. McCLELLAN: Guess under the doctrine of optional completeness he would be able to put that back in if he wanted to.

THE COURT: Okay. That's assuming that the proper predicate is laid, I will overrule your objection.

MS. WATERS: We have a death certificate.

THE COURT: It has not been offered yet.

MS. WATERS: We will be glad to offer State's Exhibit No. 68, which is a death certificate of Ernest Gilliam.

THE COURT: Do you have an objection to that?

No?

State's Exhibit No. 68, do that in front of the jury or not.

(Brief recess.)

(WHEREUPON, the following proceedings were had within the presence and hearing of the jury:)

THE COURT: Be seated, please.

Mr. McClellan.

MR. McCLELLAN: At this time, Your Honor, the State would offer into evidence State's Exhibit No. 67, which is the transcript of testimony of an Ernest Gilliam at a previous proceeding in 1982. The case of the State of Texas vs. Danny Dean Thomas, Cause No. 346,935. Tender that to Defense Counsel for his examination.

MR. CORNELIUS: We just offer the same objections we offered outside the presence of the jury.

THE COURT: Yes, sir. So noted.

MR. McCLELLAN: The State would also offer into evidence, Your Honor, State's Exhibit No. 68, which is a certificate of death for Ernest Gilliam.

MR. CORNELIUS: No objection to that.

THE COURT: State's Exhibit No. 68 will be admitted.

MR. McCLELLAN: And his testimony, Your Honor, I would ask that Miss Waters read the questions and I will respond by the answers.

THE COURT: Okay.

MR. McCLELLAN: Be on the stand or just stand here.

THE COURT: If you can talk loud enough.

MR. McCLELLAN: I can talk loud enough.

THE COURT: I think you can.

MS. WATERS: May I proceed?

THE COURT: Please.

Appendix F

Relevant Portions of Petitioner's *Pro Se* Application for Writ of Habeas Corpus in Proceedings Below

Clerk's Record, pgs. 174, 190-94

In The 180th District Court
Harris County Texas, Houston

The State of Texas

v. Cause No. 346935

ShozDijiji-ShisInday

DEFENDANT'S *PRO-SE* APPLICATION FOR WRIT OF HABEAS CORPUS

To the Honorable Judge of Said Court:

Comes now, Shozdijiji Shisinday defendant/applicant *pro-se* in the above styled cause, and requests the court to grant a Writ of Habeas Corpus, dismissing further prosecution and ordering his immediate release, and in support thereof would show:

I

Shozdijiji Shisinday, defendant/applicant *pro-se* (hereinafter shown as Shisinday) is illegally restrained in his liberty by the State of Texas, and unconstitutionally confined at the Harris County Jail by Tommy B. Thomas, Harris County Sheriff, pursuant to an unconstitutional process commenced by the Harris County District Attorney's Office, in violation of an agreement entered between "The State" and "Shisinday."

* * *

E. The State's Reprocescution of this case is barred because the state has deprived Shisinday of evidence crucial to his defense. The State's reprosecution of this case is barred because the state caused a 16 plus year delay between the time of the First Trial in which the State proceeded during the time it knew Shisinday was sedated and unable to defend that ultimately was the cause of conviction being set aside, and this time of 16 plus years later when the state is now attempting to retry this case. The state caused or contributed to the 16 plus year delay between the First Trial and its present attempt to prosecute Shisinday by trying to justify its unconstitutional prosecution in the First Trial and opposing any reprosecution in the case for those 16 plus years during which time Shisinday's demeanor and psychological appearance has been altered and greatly changed by his confinement, thus depriving Shisinday of presenting to a jury in his defense the mentally imbalance demeanor and psychological appearance of the individual he was 16 plus year [sic] ago. Not only has Shisinday's demeanor and mental appearance changed, but his physical appearance has also changed by the process of aging; his appearance, physically, is no longer that of the timed [sic], frightened, confused boy he was 16 plus years ago but has become that of an intelligent, perceptive middle aged man, thus depriving him of the ability of the ability to present the crucial evidence of the demeanor and psychological appearance of the individual accused of committing the offense in this case to a jury this many years later. Not only would reprosecution violate Shisinday's right to have his trial decided by the First Tribunal, (Terry v. Potter, 111 f.2d 454, at 458) (Retrying Terry would violate his 'valued right to have his trial completed by a particular tribunal' . . . Quoting Wade v. Hunter, 69 S.CT. 834."), but would force Shisinday to be tried after the state has deprived him of evidence crucial to his defense. Had the state acknowledged its wrongful action of prosecuting Shisinday

while he was sedated and unable to defend himself (as the state finally did acknowledge 16 plus years later in a Federal proceeding) at that time or during his State appeal, he would have been able to obtain a retrial at that time and thereby present to a jury the demeanor and psychological appearance of the person he was those many years ago, however by opposing any reprosecution for those years the State is ultimately responsible for that delay which deprived Shisinday of the evidence crucial to his defense. The record in the case will show that Shisinday was placed on medication (Thorazine) prior to his first trial due to a mental disease he was suffering at the time which effected his demeanor and psychological appearance, and Shisinday has "out grown" that mental disease in the 16 plus years that state opposed reproduction. Wherefore this court should dismiss further prosecution and enter a Writ of Habeas Corpus ordering ShisInday's immediate release from custody.

Appendix G

Relevant Portions of Petitioner's *Pro Se* Brief in Support of Application for Habeas Corpus in Proceedings Below

Supp. Clerk's Record, pgs. 97, 139-40

In The 180th District Court
Harris County Texas, Houston

The State of Texas

v. Cause No. 346935-B

ShozDijiji-ShisInday

APPLICANT'S BRIEF IN SUPPORT OF APPLICATION FOR HABEAS CORPUS

Shozdijiji Shisinday, Applicant herein, hereinafter known as Shisinday, Filed his Pre-Trial Application for Writ of Habeas Corpus on June 8, 1998; the clerk improperly filed the said application as a Post-Conviction Application, and Shisinday has sought to have that error corrected. Believing the Clerk's error will be corrected and his application for Writ of Habeas Corpus will be properly entertained by this Court, Shisinday submits the following in support of his application:

* * *

I.

Claim E; ShisInday asserted: "The state's reprosecution of this case is barred because the State had deprived ShisInday of evidence crucial to his defense." At pages 18-21 of his petition; in addition, the Federal Court in Heisser v. Ryan, 951 F.2d 559, at 564, N. 8; set forth that "discharges of prisoner for due process violations is appropriate, in Federal habeas corpus petition, where attempting alternative remedy would not vitiate prejudice of

fundamental unfairness or would itself violate defendant's constitutional rights." In this case the Federal Court determined discharge was appropriate as evidenced by the Court's entry of unconditional habeas corpus relief; what facts the Court may have used to determine that, are not clear; but may not be questioned at this late date when the State made no effort to raise any issue with that matter at the appropriate time; however it is reasonable to believe the Court considered the 17 year delay, Bedford v. Atty. Gen. of State of Alabama, 924 F.2d 203, at 207, N. 3; during which time ShisInday's demeanor and physical as well as psychological appearance has changed; as well as the effect 17 years would have on the loss of witnesses and other matters related to a trial so old.

Appendix H

Defense Counsel's Pre-Trial Motion to Adopt *Pro Se* Motions of Defendant

Clerk's Record, p. 258

NO. 346935

THE STATE OF TEXAS	§	IN THE DISTRICT
	§	COURT OF HARRIS
VS.	§	COUNTY, TEXAS 180TH
	§	JUDICIAL DISTRICT
SHOZDIJIJI SHISINDAY	§	

MOTION TO ADOPT
PRO SE MOTIONS OF DEFENDANT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, R.P. CORNELIUS, attorney of record for Defendant in the above-styled and numbered cause, and respectfully moves to adopt all pro se motions filed by defendant in this matter.

I.

This motion is not made for delay but so that justice may be done. These motions are necessary for the proper defense of Shozdijiji Shisinday.

WHEREFORE, PREMISES CONSIDERS, Defendant, SHOZDIJIJI SHISINDAY, prays that a hearing be had hereon and that upon hearing this Court allow his attorney of record, R.P. Cornelius to adopt all pro se motions in this matter.

Respectfully submitted,

R.P. CORNELIUS
440 Louisiana, Suite 1515
Houston, Texas 77002
(713) 237-8380
State Bar No. 04831500
ATTORNEY FOR DEFENDANT

Appendix I

Relevant Portions of Pre-Trial Motion Hearing Transcript

Trial Vol. 2, pgs. 3-4, 21-22, 25-27

THE COURT: This is in Cause No. 346,935, entitled, "The State of Texas vs. Shozdijiji Shisinday, also known as Danny Dean Thomas."

I have a list of 14 pretrial motions. My intention today is to sort through these motions and determine which ones can be determined on the face of the motion and which ones should be determined with the hearing of testimony or which ones should be carried with the trial.

Let me start with No. 1: Defendant's Pro Se Motion Requesting Permission To File Pro Se Motions.

First of all, let me just state that Mr. Cornelius and Mr. Wentz have been appointed to represent Mr. Shisinday. It is my intention to consider any motions that have been adopted by the Defense Attorneys, but I am not going to permit Mr. Shisinday to have hybrid representations. So, any motions that you-all intend to adopt on Mr. Shisinday I will consider.

MR CORNELIUS: If I can just be heard on that real briefly.

THE COURT: Sure.

MR. CORNELIUS: Just for purposes of the record, Mr. Shisinday's position is that under the Sixth Amendment he's entitled assistance of counsel, someone to assist him defending himself, not to stand in his place and do all the work as though he can't do it himself. So, he's asking the Court or basically putting the Court on notice that we wants to be fully involved in every phase of the trial including the pretrial motions and is asking the Court's permission to file

those. I have no problem adopting them. And if that moves us along then I move to adopt his motions so that they can be argued. But he wants a right to argue them, too, if he's unsatisfied with my arguments.

THE COURT: Okay. I am going to deny the request for him to make his own arguments with respect to the motions. If you want to adopt any motions that he files then you have that right to do that and I will consider them. But I am going to deny your request to argue your own motions.

MR. CORNELIUS: Okay. Judge, just so it is clear for the record I want to file a written motion to adopt pro se motions of the defendant just so we have that cleared up.

THE COURT: Sure.

MR. CORNELIUS: I will give the State a copy. So I will be arguing his motions to the extent that you will hear argument.

THE COURT: Okay.

MR. CORNELIUS: And I guess with specificity

* * *

THE COURT: I will appoint you to represent him on that appeal.

MR. CORNELIUS: And I don't mind doing it on a regular appeal.

While he's filling that out and we are still on the record, as the Court knows there is a number of other motions filed today. Some of them are very simple motions that will

just require a ruling but the State wasn't served with any of them until today.

MS. WATERS: If you want to go through them, that's fine. If you just want to go through them and see if there is something that's fine, we will go through them and if evidence is needed or something we will go from there but at this time I don't mind.

MR. CORNELIUS: Okay. If you have them up there. Do you have them?

THE COURT: I got them. Just gave them to me.

MR. CORNELIUS: If you will call one out.

THE COURT: Notice of Appeal From Denial of Habeas Corpus.

MR. CORNELIUS: That's what we just discussed.

THE COURT: Right.

Defense Motion To Stay Trial Proceedings Pending Habeas Corpus Appeal.

MR. CORNELIUS: Do you want to hear that now?

THE COURT: Sure.

MR. CORNELIUS: Well, that motion speaks for itself; but, basically the defendant has attempted to put the Court on notice in several ways that his writ that he filed was a pretrial writ, not a post-conviction writ, really not his fault that it was misfiled by the clerk's office. Now he's denied any relief on it because it has been ruled by the Court to be denied because the Court didn't have jurisdiction and he does

intend to appeal that and expects to get relief off of his appeal and feels that he's entitled to have this trial procedure stayed while he perfects that appeal.

THE COURT: I will deny the motion.

* * *

MR. CORNELIUS: The only other motion is he filed some time ago a motion and it's -- let me find it for you. Didn't have this in that group.

MS. WATERS: What is it entitled?

He filed a motion for release or to be given personal bond.

MR. CORNELIUS: I will find it in just a second.

MS. WATERS: I think that's the writ file.

MR. CORNELIUS: This is the writ file.

That's where I found most of the stuff, in the writ file.

Well, I never found that one, neither. But I have copies of that. I think this is something we can consider right now. Just refile that.

THE CLERK: Okay. I have.

MR. CORNELIUS: I have a copy.

Judge, this is a lengthy motion that reiterates several of the positions, principally the position that was filed in the writ that you have already denied, but which has also been raised

even today concerning the double jeopardy claim and the fact that the case was agreed dismissed in Federal court.

He filed this after filing the writ alleging that basically he felt the was going to have relief from his writ and he was requesting that he be released on personal bond in the interim. And I -- he knows and I know what the law is with respect to bond on capital murder cases.

But notwithstanding all of that, he feels with this motion that because of the extraordinary circumstances concerning his case having been dismissed --

MS. WATERS: Well, obviously we disagree on that point there as far as the case having been dismissed.

THE COURT: I would think so.

MR. CORNELIUS: -- that he's entitled to be released on bond at this point.

THE COURT: I will deny that motion. Any you realize when you say I have denied his writ, I made findings on the writ. The Court of Criminal Appeals is going to rule on the motion.

MR. CORNELIUS: You are right. I misstated that.

THE COURT: Well, it is kind of confusing.

MR. CORNELIUS: I think that's all we have today, Judge. What we do need -- excuse me one second.

THE COURT: Sure.

MR. CORNELIUS: I think that's it for right now and I am not sure we need another motion hearing any time before

jury selection or before the cutoff date of trial motions. If we do I will come over to the Court and ask.

THE COURT: Just let me know.

MR. CORNELIUS: I appreciate you going through all the motions today.

THE COURT: Okay.

Appendix J

Relevant Portions of Petitioner's Opening and Reply Briefs on Appeal

Corrected and Supplemental Brief, pgs. 65-68

VIII.
Appellant Was Deprived of the Opportunity to Present Critical Evidence, Including His Own Demeanor, Relevant to his Mental State at the Time of the Crime (Points of Error Nos. 11 and 12)

Summary: As a result of the State's forcibly medicating appellant during his first trial, and the seventeen-year delay between the alleged crime and appellant's second trial, appellant was deprived of the opportunity to present critical evidence concerning his mental state, including his own demeanor, to the jury, in both the guilt-innocence and punishment phases of the trial.

Argument

As noted previously, the crime for which appellant is accused took place in 1981 and appellant was first tried for that crime in 1982. After his 1982 conviction, the State consistently opposed numerous petitions and appeals, filed by appellant, seeking to vacate his conviction on the ground that he was involuntarily medicated with anti-psychotic medication during his trial. Some fifteen years later, in 1997, after appellant's claim had been denied by this State's courts, the United States District Court for the Southern District of Texas vacated his conviction, finding that appellant had been involuntarily medicated with large doses of anti-psychotic drugs during his trial, and that this medication had deprived him of his constitutional right to due process. Riggins v. Nevada, 504 U.S. 127 (1992). This medication, as the federal court noted, altered appellant's demeanor, violated his right against self-incrimination, and deprived appellant of a fair sentencing hearing. Thomas v. Johnson, Civil Action No. H-

95-5236, at 8 (S.D. Tex. May 19, 1997). These rights were violated because appellant was deprived of his right to present the best evidence of his own mental condition — his own demeanor — by the State's involuntary medication.

Appellant's mental state and condition were central to his case, in both the first trial and his 1998 re-trial. Appellant asserted an insanity defense, argued that his mental condition made him unable to voluntarily waive his Miranda rights and make a statement to the police, and also argued, during the punishment phase, that his mental condition mitigated his culpability, making him less deserving of a death sentence. Indeed, the federal court, in finding that Mr. Thomas' rights were violated, noted that "the pleadings [were] replete with affidavits testifying to the adverse effect of the medication on Petitioner's demeanor at trial." Thomas v. Johnson, Civil Action No. H-95-5236, at 1 (S.D. Tex., July 2, 1997); see also Riggins, 504 U.S. at 127 ("[t]he side effects of antipsychotic drugs may alter demeanor in a way that will prejudice all facets of the defense. Serious due process concerns are implicated when the State manipulates the evidence in this way.") (Kennedy, J., concurring).

While appellant was not involuntarily medicated during his second trial, he was again deprived of these rights. This time the deprivation was the consequence of the passage of time resulting from the State's failure to afford Mr. Thomas a fair trial in 1982. During his 1998 trial, appellant introduced extensive evidence and testimony that demonstrated he had long suffered from a serious mental disorder — paranoid schizophrenia — and that this disorder was manifest both at the time of the crime and in the period preceding his first trial. The evidence further showed that in the seventeen years between the crime and trial, this illness had gone into remission, and was no longer manifest or

flagrant. Thus, the Court and jury were presented with an accused who argued that, at the time of the crime and statement, he was flagrantly mentally ill. But he appeared, at the time of trial, to be rational, and participating in his defense. In other words, appellant's demeanor at trial was dramatically different from the psychotic individual he argued he was at the time of trial. And it was dramatically different from the unmedicated demeanor appellant would have been able to present to the jury in 1982, had he not been deprived of the opportunity to do so by the State forcibly injecting him with anti-psychotic medication.

Had appellant been timely tried, and not then medicated, he would likely have appeared, to the Court and jury, to clearly be mentally ill. Both the Court and jury would thus have seen a man they were much more likely to believe was unable to waive his rights, was insane at the time of the crime, and was not fully culpable or responsible for whatever they believed him to have done. Appellant would also have had the opportunity to present that man, then mentally ill, directly to the jury, by testifying. Appellant, however, was deprived of any opportunity to present that man to the jury, for by the time of his second trial, his illness was in remission, and that man no longer existed.

The State was responsible for depriving appellant of that opportunity. It is the State that involuntarily administered the medications that prevented appellant from presenting this evidence at his first trial. And it is the State that continued that violation by fighting for more than a decade, tooth and nail, appellant's contentions that he was, by virtue of this medication, denied a fair trial. The State was thus responsible for both the initial Riggins violation, and the delay between the two trials. Cf. United States v. Marion, 404 U.S. 307 (1971) (Sixth amendment right to speedy trial

violated where accused is actually prejudiced and where government is responsible for delay). That deprivation, appellant submits, deprived him of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution, as well as his Eighth Amendment right to a fair sentencing hearing. His conviction and sentence, we submit, should therefore be vacated.

* * *

Reply Brief, pgs. 25-27

VII.
Appellant Was Deprived of any Opportunity to Present his Unmedicated Demeanor to the Jury
(Points of Error Nos. 11 and 12)

The State makes three arguments in response to these two points of error, which assert that appellant, as a result of the State's action, was deprived any opportunity to present his unmedicated demeanor to jury.

The State's first argument is that there was no "comporting objection or other request for relief" in the trial court. That is not correct. Appellant expressly raised this precise issue in two separate pre-trial filings: first, in Defendant's Pro-Se Application for Writ of Habeas Corpus, filed May 22, 1998, (CR 174-94, see specifically CR 190-92), and second, in Applicant's Brief in Support of Application for Habeas Corpus (SCR 97-110, see specifically SCR 106-07). Although these papers were originally filed pro-se by appellant, they were adopted by trial counsel, and relief was denied thereon by the trial court. See Hrg. at 4, 21-22, 26-27.

Second, the State asserts, as it did with respect to point of error ten, that this argument depends upon factual assertions outside the record. But as we noted above, the federal court found that "[t]he medical testimony suggests that Petitioner's prescription could render a person sleepy or sluggish, and trial counsel testified that Petitioner appeared to sleep or feign sleep during trial." Thomas v. Johnson, Civil Action No. H-95-5236, at 2 (S.D. Tex. July 2, 1997) (annexed as Exhibit A). That appellant's demeanor was altered by his medication at his 1982 trial is thus a finding that is law of the case. And there was an enormous amount of evidence presented at appellant's 1998 trial concerning his mental illness, which established (1) that he suffered from paranoid schizophrenia, including delusions and other severe effects of that illness, in 1981 and 1982, and (2) that the illness, by 1998, was in remission. See Tr. 20 at 1-36 (testimony of Dr. Sarmiento on guilt/innocence); Tr. 22 at 93-108 (testimony of Dr. Sarmiento on punishment); Tr. 23 at 8-10, 17-38 (testimony of Dr. Cunningham on punishment). Thus, the federal court's findings and the testimony adduced at trial clearly establish both that appellant's demeanor was altered during his 1982 trial, and that the flagrant mental illness from which he suffered in 1982 was no longer manifest in 1998.

Finally, the State's assertion that no due process or eighth amendment right was implicated by the State's alteration of his demeanor is contrary to the findings of the federal court in appellant's case. That court, in finding that appellant was deprived of due process, noted that "the pleadings [were] replete with affidavits testifying to the adverse effect of the medication on Petitioner's demeanor at trial." Thomas v. Johnson, Civil Action No. H-95-5236 at 1 (S.D. Tex. July 2, 1997). And Justice Kennedy, concurring in the Riggins case, also noted that "the side effects of antipsychotic drugs may alter demeanor in a way that will

prejudice all facets of the defense. Serious due process concerns are implicated when the State manipulates the evidence in this way." Riggins, 504 U.S. at 1 (Kennedy, J., concurring).

Thus, the State's argument that altering appellant's demeanor did not deprive him of due process is contrary to both the findings of the federal district court in appellant's case, and to Justice Kennedy's opinion in Riggins. Based on the testimony at appellant's trial, there can be no serious dispute that appellant could not display the same demeanor in 1998 that he could in 1982. Accordingly, there was, by 1998, no way for the trial court to remedy the deprivation of due process created by the combination of the State's involuntary medication of appellant in 1982, and the State's failure to concede that error and retry appellant more promptly. Appellant's conviction and sentence should therefore be vacated, and a judgment barring any retrial entered in favor of appellant.

Appendix K

Motions for Mistrial

during Jury Deliberations

Trial Vol. 26, pgs. 3-8

(WHEREUPON, the jury was retired to continue their deliberations.)

(WHEREUPON, the following proceedings were had outside the presence and hearing of the jury:)

THE COURT: I have received a note stamped 11:56 a.m. this morning indicating the jury is unable to agree on Special Issue No. 3. It is now 2:56 according to my watch. The jury has been, since the note was sent out, been to lunch and been on at least one break.

MR. CORNELIUS: And you are proposing to do what?

THE COURT: I was going to send them a note, "Please continue your deliberations."

MR. CORNELIUS: For the record, we object to that and move for a mistrial. I think that any further deliberations will be unconscionable since the jury sent out a note saying after conscientious deliberation they can't resolve Issue No. 3. So, we move for a mistrial.

THE COURT: That is denied.

(Brief recess.)

4:25 p.m.

THE COURT: Make your motion. Go ahead and make a motion.

MR. CORNELIUS: We are on the record now?

THE COURT: Sure.

MR. CORNELIUS: And the note has been marked and filed?

THE COURT: Yes, sir.

MR. CORNELIUS: Can I read it into the record?

THE COURT: Sure.

MR. CORNELIUS: We have just received a note or actually I don't know, came in at 4:20 and it is now 4:30. "We the jury, remain at the same 9/3 vote. The three haven't changed since yesterday and they insist they will not change. The nine haven't changed and they insist the will not change. Continued deliberations are futile."

Based upon this note, Your Honor, we would move for a mistrial in the case.

THE COURT: I will deny your motion at this time.

For the record I will note that the jury sent out a note yesterday at the end of the day 5:45 and said they could resolve. We believe it will be more time before we work this out which we believe we will, which was the note yesterday afternoon. So, I will deny your motion at this point.

MS. WATERS: Are you going to write "continue deliberating"?

MR. CORNELIUS: Just for the record, we object to the Court's instruction to the jury which was: You are to continue deliberating.

THE COURT: Okay.

(Brief recess.)

* * *

5:05 p.m.

MR. CORNELIUS: Go on the record. I would like the record to reflect that it's 5:00 o'clock on Friday afternoon. The jury went out yesterday on punishment about 12:30. They still don't have a verdict. The last note which was received at 4:20 indicated that they had been deadlocked nine to three since yesterday afternoon. Didn't say what time yesterday afternoon just said yesterday afternoon. It said that three people that were on the three people's side were not going to change and nine people on the nine people's side were not going to change. They have been deadlocked that way for 24 hours, give or take a few minutes depending on what time yesterday they arrived at that position. It could have been longer than 24 hours.

Irrespective of how long they have deliberated they have been deadlocked for over 24 hours and we feel that any further deliberations would violate their consciences and would violate the defendant's Sixth and Eighth Amendment rights and Fourteenth Amendment right to due process.

So, we again move for a mistrial.

THE COURT: It is denied.

MR. CORNELIUS: We request a jury instruction which I filed with the clerk which is to the effect that the jury be instructed if you are going to allow them to keep deliberating, which I am sure you are since you just overruled my motion for mistrial, that they be instructed if they can't

arrive at a unanimous verdict on the special issues concerning favoring death or a 10-person agreement on special issues favoring life that a mistrial must be declared and that the defendant would not be discharged, that the defendant would receive an automatic life sentence.

Further to instruct them that they are not to do violence to their own consciences.

And we would request that instruction be given at this time, Your Honor.

THE COURT: Okay.

MS. WATERS: I would object to that instruction being given pursuant to Art. 37.071., Sec. 2. I believe it is improper for the jury to be told the result of their hanging.

THE COURT: Deny your requested instruction.

MR. CORNELIUS: Okay. Thank you.

(Brief recess.)

5:50 p.m.

MR. CORNELIUS: It is now 10 minutes to 6:00 on a Friday night, November the 20th, by the clock on the courthouse wall, 10 minutes to 6:00. The jury sent out another note which informs the Court that they are still hopelessly deadlocked, that three of the jurors are voting "yes" on the third issue -- I presume that's what they mean -- and nine are voting no.

The note further says that one of the jurors has made the statement he will hold out for all of eternity and the other two are holding firm.

We would again move for a mistrial for the other reasons stated earlier and add that at this point surely any change in any of the juror's position either for the Defense or against the Defense would violate their consciences and we move for a mistrial.

THE COURT: I will deny your motion.

6:00 p.m.

(WHEREUPON, the proceedings were recessed until the 21st day of November, 1998.)

* * *

Trial Vol. 27, pgs. 3-5

(WHEREUPON, the jury was retired to continue their deliberations.)

(WHEREUPON, the following proceedings were had outside the presence an hearing to the jury:)

MR. CORNELIUS: May I proceed?

THE COURT: Please, sir.

MR. CORNELIUS: Let the record reflect that it is about 10:18 on November the 21st. The jury is still deliberating. We received a note – I have been told that we have received the note and the note says the jury is now ten to two, ten votes for no and two votes for yes. We understand that to mean that would be ten votes for death and two votes for life which is the way we have interpreted it.

We move for a mistrial again as we did yesterday on numerous occasions because we feel that any further

deliberations on the part of the jury would violate their consciences and not be productive and violate the defendant's Sixth and Eighth Amendment rights and Fourteenth right as well.

The note further said that the two that were holding out were standing firm and the notes have indicated yesterday that at least one of the ones that are holding out said he would hold out until eternity. And making such a strong statement as that any change, if he were make a change at any time, would obviously violate his conscience and violate the defendant's rights.

We move for a mistrial.

THE COURT: It is denied.

* * *

5:55 p.m.

MR. WENTZ: Your Honor, at this time it is Saturday, the 21st, which is five minutes to 6:00 and the Defense at this time would respectfully move for a mistrial. Deliberations have effectively been going on for two and a half days and further deliberations would be unduly coercive of this particular jury.

The jury has sent out notes indicating their position. The last note came out, if I am not mistaken, earlier today. When they have sent out notes they have essentially gone unanswered and I think that the jury does not know essentially where it is and is without direction conceivably at this time. And being without direction their deliberations take on a further coercive nature and we would move for a mistrial at this time.

It is our belief that the jury has been deliberating for approximately 17 hours roughly at this time.

THE COURT: Okay. I will deny your motion and the record should reflect that the last note I received from the jury was this morning at 10:00 o'clock and indicated that there had been some change since yesterday evening with respect to the vote in the jury room.

Deny your motion.

MR. WENTZ: And we would at this time again request that the charge provisionally requested be submitted to the jury and we believe that making this request at this time after this lengthy amount of deliberations would be an appropriate action at this time.

THE COURT: Okay. I will deny your request.

MR. WENTZ: Thank you very much.

(WHEREUPON, the proceedings were recessed until the 22nd day of November, 1998.

Appendix L

Requested Jury Instructions during Jury Deliberations

Clerk's Record at p. 434

THE STATE OF TEXAS	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
vs	
SHOZDIJIJI SHISINDAY	180TH JUDICIAL DISTRICT

REQUESTED JURY INSTRUCTION

MEMBERS OF THE JURY:

If this jury finds itself unable to arrive at a unanimous verdict on all of the special issues favoring a verdict of death, or a verdict agreed upon by at least 10 of your members on any of the special issues favoring a life verdict, then a mistrial must be declared.

The defendant would not be discharged. The trial would conclude and the defendant would receive an automatic life sentence.

With this additional instruction, you are requested to continue deliberations in an effort to arrive at a verdict that is acceptable to all members of the jury, if you can do so without doing violence to your conscience.

Do not do violence to your conscience, but continue deliberating.

Respectfully Submitted

R.P. Cornelius

Filed Nov. 20, 1998 5:00 p.m.

Appendix M

Relevant Juror Notes during Deliberations

Clerk's Record, pgs. 433-35

Your honor:

We are unable to agree on Special issue #3. There seems little hope of any movement on individual juror's positions.

We ask your guidance.

John Campbell

Ladies & Gentlemen:

Please continue your deliberations.

[Judge] DM Strickland

Filed Nov. 20, 1998, 4:20 pm

* * *

Your Honor:

We the Jury remain at the same 9-3 vote. The 3 haven't changed since yesterday, and they insist they will not change. The 9 haven't changed, and they insist they will not change.

Continued deliberations are futile.

Respectfully,

John Campbell

Ladies & Gentlemen:

Please continue your deliberations.

[Judge] DM Strickland

Filed Nov. 20, 1998, 11:56 am

* * *

Your Honor:

We have 9 votes "no" and 3 votes "yes." Of the 3 votes, 1 has repeated that he will not consider any change "for all of eternity." The other 2 are holding firm.

Of the 9 "no" votes, all are firm.

Respectfully,

John S. Campbell

Filed Nov. 20, 1998, 5:50 p.m.

* * *

Your Honor:

Our vote is 10 "no" and 2 "yes." Of the "yes" votes, one continues to insist that no argument or discussion will change his position. The 10 "no" votes are firm.

Respectfully,

John S. Campbell

Filed Nov. 21, 1998, 10:04 a.m.

Appendix N

Gilliam Testimony

Trial Vol. 18, pgs. 98-102

(WHEREUPON, the document marked, offered and received into evidence as State's Exhibit No. 67, containing the sworn testimony of ERNEST K. GILLIAM, was read to the jury as follows, Questions read by Ms. Waters and Answers read by Mr. McClellan:)

"Q. Could you state your name?

"A. Ernest K. Gilliam.

"Q. How old are you, sir?

"A. 60.

"Q. Sir, where do you live?

"A. 4916 Anchor.

"Q. How long have you lived in Houston?

"A. 27 years.

"Q. And what do you do for a living?

"A. Service station work.

"Q. Sir, let me direct your attention back to last summer, back in the summer of 1981, and ask you if back at that time you knew a man named Danny Dean Thomas?

"A. Yes, sir.

"Q. How did you know Mr. Thomas?

"A. Well, through my wife. She used to babysit when he was a kid.

"Q. All right. And when is -- and is that the way you came to know him?

"A. Yes.

"Q. Now, do you see him in the courtroom today?

"A. Yes, sir.

"Q. Would you please point him out, sir?

"A. Right over there, that green suit.

"Q. And I ask if you last year -- last summer you owned a pistol at that time?

"A. Yes, sir.

"Q. What kind of pistol did you own?

"A. .25 automatic.

"Q. And how long had you had that pistol?

"A. About three years.

"Q. Mr. Gilliam, let me ask you to look at State's Exhibit No. 10 and I ask you, sir, if you recognize that item?"

MS. WATERS: For the record, Your Honor, there is a notation on State's Exhibit No. 10 from the previous proceeding that it was still at that time, State's Exhibit No. 10, dated March 3rd, 1982.

THE COURT: So ordered.

"A. Yes, sir.

"Q. What is that?

"A. .25 automatic pistol.

"Q. Where have you seen this pistol before?

"A. I had it and I showed it to Danny Thomas.

"Q. How long have you had this pistol, State's Exhibit No. 10, before you sold it to Danny Dean Thomas?

"A. Approximately three years.

"Q. Do you remember about what time it was last year you sold it to Danny?

"A. I believe it was in July, sir.

"Q. How did you happen to sell him that pistol in July?

"A. Well, he was staying there at the house with us and he saw it and he wanted to buy it. I sold it to him.

"Q. Did he tell you why he wanted to buy it at that time?

"A. No, sir.

"Q. Were you showing it to him on some day or how did he come to see it?

"A. Well, I carry it to the station when I close it up and I laid it on the table and he saw it.

"Q. How much did you sell that gun for?

"A. $50.

"Q. And was that the last time you saw Danny?

"A. Yes, sir.

"Q. How long did he stay with you?

"A. A little over three weeks.

"Q. Anybody else with him staying with you at that time?

"A. His wife.

"Q. And who was his wife?

"A. I can't -- Phoebe I think was her name.

"Q. After you sold him that pistol how long after that did he move out from where you-all were staying?

"A. About two or three days.

"Q. Is that the last time you saw him?

"A. Yes, sir."

THE PROSECUTOR: "Pass the witness, Your Honor."

MS. WATERS: Questions by Mr. Hayes.

"Cross-examination.

"Q. Mr. Gilliam, was there one clip or two clips of that gun when you sold it to the defendant?

"A. Pardon.

"Q. Was there one clip or two clips?

"A. One.

THE DEFENSE ATTORNEY: "That's all the questions I have, Your Honor."

THE PROSECUTOR: "I have no further questions, Your Honor."

THE DEFENSE ATTORNEY: "Pass the witness."

MS. WATERS: Your Honor, at this time, the State would call Bill Olive; but, my understanding is it was going to be a lunch break.

THE COURT: Would you-all come up for just a second, please.

(WHEREUPON, there was a discussion held at sidebar, outside the hearing of the court reporter.)

THE COURT: Ladies and gentlemen, I am going to go ahead and call a lunch recess at this point. Please do not discuss the case when you are on the break. Please feel free to talk about anything else other than the case.

Would you retire to the jury room, please.

(Lunch recess.)

THE COURT: Would you be seated, please.

Good afternoon.

Miss Waters, call your next, please.

MS. WATERS: At this time the State calls William Olive.

THE BAILIFF: He needs to be sworn.

(Witness sworn.)

Appendix O

Relevant Testimony of Dr. Kayla Paul

Trial Vol. 17, pgs. 10-12, 21, 47

KAYLA PAUL, M.D.

was called as a witness and after being duly sworn testifies on her oath as follows:

DIRECT EXAMINATION

BY MR. McCLELLAN:

Q. Would you state your name for the record, please?

A. Kayla Paul.

Q. Okay. And, Miss Paul, how are you employed?

A. I am currently assistant vice president and director of safety surveillance for Whitehall-Robins Health Care.

Q. Okay. Can you give the ladies and gentlemen of the jury the benefit of your educational background?

A. I have an M.D. degree, that's a medical degree, from the University of Texas Medical Branch in Galveston, 1981. And I have a year's training in psychiatry as an intern, a year's training in clinical medicine as an intern, three years training in neurology. I am board certified in neurology.

Q. Okay. Back in July of 1981 where were you at that time?

A. I was an intern in psychiatry at the University of Texas Medical Branch in Galveston.

Q. And directing your attention back to July the 18th of 1981 were you working that day?

A. Yes, I was. I was on call.

Q. All right. And you were on call for where?

A. I was on call for the department of psychiatry which meant that I covered psychiatric inpatient services in the hospital for John Sealy Hospital. I covered the consultation service for all the inpatient wards for surgery and medicine and I covered the emergency department for any psychiatric emergencies.

Q. Okay. And back then were you licensed to practice medicine?

A. I was -- I had an institutional license to practice medicine in the context of my internship.

Q. And are you currently licensed to practice medicine in two states?

A. I am licensed to practice medicine in the State of New Jersey and I have a license in the State of Texas.

Q. On July 18th, 1981, did it come to your attention sometime that day that a person by the name of Danny Dean Thomas was there to see you?

A. Yes, I was told that there was a person waiting to see me.

Q. All right. And about what time of the day was that if you recall?

A. It was late in the afternoon, 5:00 or 6:00 o'clock, something like that.

Q. And did you see him immediately?

A. No, I did not. I had other emergencies that I had to take care of.

Q. Did you visually observe him, though, at or about the time you were told that he was there to see you?

A. At some time I saw him in the emergency department.

Q. And what time then did you actually see him in one of the examination rooms?

A. About 10:00 o'clock.

Q. At the time you saw him prior to 10:00 o'clock did he appear in any type of acute distress or anything abnormal about him?

A. No, he did not.

Q. If there had been would you have seen him sooner?

A. That is correct.

Q. Was the defendant there by himself or with someone?

A. He was there with his mother.

Q. And whenever you went into the examination room was his mother also present during the entire time

* * *

A. Um, well, I was asking, I guess, did you want me to read this or did you --

Q. I don't want you to read it; but, if any of it refreshes your memory -- I assume that the report, correct me if I am wrong, is a recordation of your impressions at the time?

A. Yes, it is.

Q. Okay.

A. Mr. Thomas was at the time a thin and somewhat anxious, cooperative young man who looked tired and was anxious in the context of the story that he was telling in the emergency department.

And could you refresh me on the exact nature of your question? I am sorry.

Q. His demeanor in relating these events and responding to your questions.

A. His demeanor was appropriate. And by "appropriate" I meant he was telling a story that had pretty simple straightforward things happening in it. He expressed dismay when he talked about the dog. Sadness when he talked about having shot the dog. He expressed some degree of happiness at having been able to help the young woman.

So, he was totally cooperative giving me the answers that were appropriate to the questions I asked and

* * *

A. No, I did not ask any legal questions.

Q. And I think that back in on the 19th you've also had occasion to conclude that he understood that his thoughts were different from others?

A. I wrote that on there.

Q. And that he clearly had exhibited delusional thinking in the past.

Did you also say or conclude that he had a schizo-affective disorder?

A. That was the assessment that was written at the time.

Q. Did you see the defendant eat anything at all during this interval?

A. No, I did not.

Q. And was Mr. Thomas always with his mother as you report?

A. In my presence he was always with his mother.

Q. And when the peace officers arrived was he with his mother?

A. Yes, he was.

MR. WENTZ: I pass the witness.

THE COURT: Mr. McClellan.

MR. McCLELLAN: If I might, Your Honor.

Appendix P

Relevant Portions of

Dr. Sarmiento Testimony at Guilt Trial

Trial Vol. 20, pgs. 16-36

ROBERT F. SARMIENTO, Ph.D.,

was called as a witness and after being duly sworn testifies on his oath as follows:

DIRECT EXAMINATION BY

MR. WENTZ:

Q. Good morning.

A. Good morning.

Q. Could you tell us your name, please?

A. Yes. Robert F. Sarmiento.

Q. And could you tell us how you are employed?

A. I am a psychologist in private practice in Houston.

Q. And could you tell us your educational background, please?

A. Yes. I have a Bachelor of Arts degree in psychology from Harvard University in Cambridge, Massachusetts, and a Ph.D. degree in psychology from the University of Rochester in Rochester, New York.

Q. Could you tell us briefly about your professional career, where you have been employed and where you have worked?

A. Okay. Yes, sir. I was employed on the faculty of the University of New York campus at Rockport for about four years. I went into practice in Houston in 1976 and I have been in practice in Houston since 1976.

Q. Are you certified and licensed to practice psychology in the State of Texas?

A. Yes, I am, since 1976.

Q. And could you tell us some professional organizations of which you are a member?

A. Yes, sir. I am a member of the American Psychological Association and the Houston Psychological Association.

Q. In the course of your practice have you had occasion to do evaluations or assessments of individuals from time to time?

A. Yes, I have.

Q. Have you done that on many or few occasions?

A. I would say very many. That is a big part of my practice is assessment or evaluating people.

Q. And could you tell us about how many people you have done generally speaking?

A. Probably on the order of about 4500 people. Might be more than that. But roughly, you know, between three and four thousand people I would say.

Q. And during the course of your practice have you ever had occasion to provide assessments or evaluations for specific employment groups?

A. Yes, sir.

Q. And could you tell us some of the employment groups that you routinely do assessments for?

A. Well, for businesses I evaluate people for pre-employment promotion and also work with a dozen or so police departments providing pre-employment psychological evaluations of probably about 500 police officers and applicants.

Q. Can you tell us some of the police departments for which you do these assessments?

A. Yes. Baytown Police Department, Village Police Department, Hedwig Village, Missouri City, Stafford, Katy Police Department, Harris County Sheriff's Department.

Q. Are these assessments required for their employment?

A. Yes, they are.

Q. Let me refer you to 1982, if I may, Dr. Sarmiento, and at that time did you come to know an individual who you then knew as Danny Dean Thomas?

A. Yes, I did.

Q. And do you see that individual in the courtroom today?

A. Yes, I do.

Q. And could you identify him by an article of clothing that he is wearing?

A. The gentleman (indicating) with the white shirt to your right.

Q. In 1982 did you go about performing an evaluation or assessment of the person that you then knew as Danny Dean Thomas?

A. Yes, I did.

Q. Could you tell us as part of that assessment were any tests performed or tests given to Mr. Thomas?

A. Yes, they were.

Q. Could you tell us some of the names of the tests, please?

A. Yes. I gave a standard psychological evaluation which included -- well, you asked for the tests. The Minnesota Multiphasic Personality Inventory or MMPI, the Rorschach Diagnostic Test or Rorschach Inkblot Test, House/Tree/Person Test. I also administered the Wechsler Adult Intelligence Scale and the Wide Range Achievement Test and also the Bender-Gaustalt Test.

Q. With regard to the Wechsler, can you tell the jury what that is?

A. That is an individual IQ test or standard IQ or measure that is designed to determine a person's learning ability.

Q. Had you given that test on occasions in the past?

A. Oh, yes, many occasions.

Q. Have you continued to give that test into the present time?

A. Yes, I have.

Q. What were the results of that test, if you could tell us, please?

THE WITNESS: May I refer to my notes, Your Honor?

THE COURT: Sure. Yes, sir.

A. On the Wechsler Adult Intelligence Scale Mr. Thomas achieved a verbal IQ of 86 which is the 18 percentile which is he did better than 18 percent of other people in terms of his verbal ability. His performance for nonverbal attendance was an IQ of 98 which was 45 percentile on the full scale. He had an IQ of 91 which is 27 percentile. In other words, his predicted learning speed or ability was better than only about 27 percent of people on the full scale.

Q. (BY MR. WENTZ) And which would mean that essentially 63 percent performed higher?

A. That's correct, yes, sir.

Q. Could you tell us what the Wide Range Achievement Test results showed you?

A. Yes. On the Wide Range Achievement Tests Mr. Thomas achieved a 4.7 grade level in reading, which was only the second percentile, and the 3.9 grade level. In other words, third grade level or fourth percentile on spelling.

Q. Now, could you tell us what those percentiles mean?

A. Well, it -- basically he was functionally illiterate. I would say that his reading and spelling achievement levels were very deficient and better only then, well, 2 to 4 percent of other people.

Q. The Wide Range Achievement Test, had you given that test in the past?

A. Yes, I have.

Q. Do you continue to give that test?

A. Yes.

Q. Is that a recognized test within the psychological community?

A. Yes, it is.

Q. Basically as a result of these two intelligence-oriented tests what were your conclusions?

A. Well, that Mr. Thomas was of average intelligence but showed some deficiencies in verbal type-intelligence and in-school achievement that could reflect either a learning disability or just very limited educational opportunities; but, he was functionally illiterate basically.

Q. Dr. Sarmiento, did you do anything to ascertain whether or not he was malingering or whether or not, to put it another way, he was motivated in performing for you?

A. Yes.

Q. How did you go about making that determination?

A. Well, in any assessment there is always the possibility that the person is malingering or faking or that there might be some kind of interference in the results that would prevent one from obtaining a valid assessment. So, that's something that is always considered. But there are some -- first of all, there are some validity scales on some of the tests that are designed specifically to measure how the person was oriented toward the test.

Q. So, there are within the tests some, if you will, hurdles they have to clear to indicate that they were not malingering?

A. Yes, that's correct.

Q. What other factors?

A. Well, in addition certainly one would observe the behavior of the individual going through the testing as far as motivation and effort. Really the other main thing is that one looks at the sort of consistency between the different kinds of information they have, both the clinical impressions and the various tests to see whether they fit together internally or whether they make sense and whether it makes sense in terms of, you know, external things. In other words, like is it possible and that kind of thing.

So, really a lot -- I guess the main judgment is, to the validity of the results, is how both internally and externally consistent the results are.

Q. Did you feel that Mr. Thomas on those occasions was giving a good effort?

A. Yes.

Q. As part of your evaluation did you also interview the person that you then knew as Danny Dean Thomas?

A. Yes, I did.

Q. And did this interview basically involve you talking to him and him responding to your questions?

A. Yes. But it wasn't just talking. It's more of a -- sort of a semi-structured interview process where you do a mental status exam to review various symptoms or signs of behavioral issues and then also a detailed history of the individual in terms of family background, educational/work history, health history, criminal history, you know, things like that. So, it is not just talking. I mean it is sort of a semi-structured process.

Q. Did you have occasion to talk with him about the incident that is before us today?

A. Yes, I did.

Q. Do you remember or do you recall what he said with regards to that?

A. Yes.

Q. What was that?

A. Well, do I go through the whole thing or --

Q. Well, do you recall whether or not he remembered being told that he did it by somebody?

A. Yes. Well, he basically had kind of recounted the events of that night and the following day and, yes, I asked him if he had actually remembered all that and he said that at least parts of it he did remember and parts he had been told that it happened and he remembered being told but not necessarily what actually happened.

THE COURT REPORTER: Could you repeat that, please?

A. He didn't remember parts. He did remember some parts but on other parts he did not remember them but rather remembered being told about them.

Q. (BY MR. WENTZ) From the testing from your evaluation did you draw any conclusions in terms of his mental difficulties with regards to Mr. Thomas?

A. You mean like the diagnosis?

Q. Yes, a diagnosis.

A. Yes.

Q. And what was that, please?

A. Well, in my opinion, Mr. Thomas was suffering from atypical paranoid schizophrenia, borderline

personality disorder and borderline personality disorder with antisocial features.

Q. Now, if you could, let us talk about the schizophrenia, atypical which I will refer to it as.

A. Yes.

Q. Can you tell us what that means?

A. Well, schizophrenia is the severe mental disturbance that probably the average person would think of as crazy. It's characterized by delusions or really loss of contact with reality, difficulty to distinguish what's real and what's not real. And it is characterized by delusions, hallucinations, bizarre behavior, things of that sort.

Q. Now, why did you diagnose this as atypical?

A. Well, because that Mr. Thomas' case it wasn't really in the typical presentation of schizophrenia. A person kind of flips out and flips in so to speak.

In Mr. Thomas' case it was more that he kind of flipped in and out. There would be times when he was actively psychotic and other times when he wasn't. And really the schizophrenic parts were combined with the borderline features so that when he is under stress or any kind of duress he might show the full-blown psychotic features but at other times he might not.

Q. Could you tell us about the borderline personality disorder that you diagnosed him as having?

A. Yes. A borderline personality disorder is a condition in which basically the individual shows a great deal

of instability in a lot of different areas of psychological functioning. They are emotionally unstable. Like they might get depressed and anxious but not all the time. Sort of comes and goes again. They show very intense unstable inter-personal relationships. They go from over-idealizing someone to hating them so that somebody is either all good or all bad. Behaviorally very unstable. They show, you know, variations of behavior like sometimes be very meek and sometimes being very aggressive. They generally show very intense uncontrollable angers or fits of anger. And also often very self-destructive type behavior. Substance abuse, suicide attempts, things of that sort. So, just the picture is of a very unstable person.

Q. What aspects of what you came to know about Mr. Thomas did you see with regards to some of these? Did you observe or come to recommend that he may be an emotionally dependent individual? Did you see that in Mr. Thomas?

A. Well, at times. But, you know, again going back to the borderline condition it could be very dependent but then at times he might not. It might disavow any kind of relationship or any connection with anybody. So, once he got involved with somebody he might become very dependent but then, you know -- but it wasn't just -- it is not a dependent person.

Let me put it this way: That borderline personality shows a lot of very mixed symptoms. They show characteristics of many personality disorders. They show a lot of neurotic traits. They show -- so, it is just a very mixed picture.

So, in some ways I would say he was dependent, but I wouldn't say he was a dependent personality

in a way of a sort of meek, submissive person all the time. He would show those traits sometimes.

Q. Could you tell us or tell the jury about the borderline personality disorder that you described and the schizophrenia that you described?

A. Yes. Well, borderline personality is typically they don't decompensate or deteriorate into psychosis. Like I said, they don't flip out all the time or flip out permanently. Of course, it is not completely understood, but there is a connection there between sort of psychotic episodes that might come during periods of particular stress that might relate to the borderline condition.

So, borderline -- the name borderline really comes from the idea that it is a condition that is sort of between psychotic and, you know, sort of neurotic type conditions.

Q. Now, did you say that this came with antisocial features?

A. Yes.

Q. What did you mean by that?

A. Well, antisocial is what I guess the average person would think of as kind of a criminal type personality that engages in various antisocial acts from childhood on. Like in childhood, truancy, skipping school, running away, shoplifting, things like that. In an adult life, actual criminal behavior, fighting, an antisocial personality, is sort of a con artist, sort of a cold-blooded kind of con artist type manipulator, that which has very little regard for other

people's feelings, doesn't feel much guilt, a very sort of cold-blooded sort of person.

Q. How is the personality or borderline personality disorder with antisocial features that you diagnosed Mr. Thomas as having different from somebody who has an antisocial personality disorder? What is the distinction between the two?

A. Okay. Well, basically antisocial personalities don't show the kind of instability, emotional and behavioral instability that a borderline person would. An antisocial personality, for example, often doesn't feel much -- they don't get uptight or they don't feel depressed or anything. Like I said, they tend to be kind of cold-blooded. So, in a borderline personality a lot of the antisocial behavior is much more -- much less planned. It is more a result of kind of impulsive emotional reaction rather than like being planned out or anything like that. So, you don't just -the straight antisocial personality, typically don't see all that emotional disturbance.

Q. What specific factors with regards to Mr. Thomas did you observe that caused you to not make this antisocial personality diagnosis- and-make the borderline personality disorder with antisocial features with regards to him specifically?

A. Well,-there is sort of a technical reason for that, that with the concurrent diagnosis of schizophrenia that rules out the diagnosis of antisocial personality. In other words, if antisocial behavior is secondary to schizophrenic condition then it would not -- the diagnostic rules and DSM-III rules out the diagnosis of antisocial personality.

So, that's kind of the technical reason. But, you know, aside from just the technicalities of it really I saw the antisocial behavior, the criminal acts and things like that, as really more of the result of the emotional disturbance and the thought disturbance. Schizophrenia is a disturbance of thinking process rather than just -- so they were really secondary to the emotional and thought disturbance.

Q. Did you see in Mr. Thomas the ability to express remorse or express regret?

A. Yes.

Q. And did you see in Mr. Thomas the ability to form strong friendships or relationships?

A. Well, no, I think that he had a great deal of difficulty in forming any kind of stable relationships, you know, again because of that sort of fundamental instability. He would, you know, latch onto somebody sort of too strongly and then, you know, disavow them very strongly. The deep ambivalence that he had about relationships would really preclude any very satisfying or meaningful relationships.

Q. The converse of that, did you observe that he was capable of using people as an antisocial personality disorder might?

A. Okay. I think he did try to be manipulative, but he probably wasn't a very good con artist because of all the instability in his personality, the emotional disturbance, inability to think in a really clear and coherent way.

Q. Did you observe Mr. Thomas with regards to his self-esteem?

A. Yes.

Q. And what would you say with regards to that?

A. I would say very low self-esteem. Very poor. Not only just low but a very poor sense of who he was. One of the other areas of instability that I forgot to mention in borderline is identity instability, that he didn't have a clear sense of any kind of vocational identity, even a sexual preference. It is not that he -- I don't think that he was bisexual or anything. He just didn't know who he was. He had no clear idea of who he was or where he was going. No goals. No plans.

So, then, in that sense, it is not just the typical kind of low self-esteem that, you know, most people might feel, which is very common, of course; but, really more of a lack of any real sense of identity at all.

Q. Going along with that topic how would you describe his level of self-confidence?

A. Well, you know, self-confidence is kind of a funny term. It often -- I think people use that often to mean sort of self-esteem, you know, how sort of positively you see yourself. Or it could be just a judgment of your competency in some things.

So, again, I just -- I think he just didn't have enough sense of -- enough of who he was to really have any kind of sustained sense of confidence or lack of confidence really; but, I don't think he felt like he was a very competent person, no.

Q. Could you tell us when in 1981 it was that you saw Mr. Thomas or the person you then knew as Mr. Thomas?

A. Yes, I saw him on February 2nd -- February 10th, excuse me, of 1982, and March 8th of 1982.

Q. Are you aware of the thing called the Miranda warnings or the Miranda rights?

A. Yes, I am.

Q. And the right to an attorney, the right to have an attorney afforded to you if you can't afford an attorney?

A. Yes.

Q. Given your interviews, given your tests with Mr. Thomas, do you have an opinion as to whether Danny Dean Thomas could knowingly, intelligently and voluntarily waive his Miranda rights at the time of making the statement on July 19th, 1981?

A. Yes.

Q. And could you tell us what that opinion is?

A. Well, I think it is unlikely that he could have had the mental capacity to do so, to knowingly waive those rights.

Q. Now, the mental conditions that you observed in early 1982, were they of such a long-standing nature that they would have been present in 1981, in July of 1981?

A. Yes.

Q. Now, you cannot tell us exactly what happened in July or July 19th, 1981, can you?

A. No.

Q. You are not saying or you cannot tell us whether he did or did not intelligently, knowingly and voluntarily waive those rights at this time, can you?

A. No.

Q. But is it your testimony given the testing, given your interviews, that he probably did not understand these rights when he --

MR. McCLELLAN: Object to leading, Your Honor.

THE COURT: Don't lead your witness.

Q. (BY MR. WENTZ) Is it your conclusion then -- well, what is your conclusion?

A. Well, as I mentioned, I think it was unlikely that he had the mental capacity due to his mental condition to waive those rights in the manner you suggested.

Q. Do people with the problems that you have described that Mr. Thomas had, decompensate or deteriorate under pressure?

A. Yes, that is very characteristic of borderline personalities.

Q. Can you explain this for us?

A. Well, I guess whenever anybody has any sort of difficulties or stress or pressures we tend to get more upset. In the case of somebody that is very unstable that just goes to the extreme, so that a borderline personality can sometimes function fairly well but then when they are under pressure they kind of flip out, to use the lay term, or may have a frankly psychotic episode.

Q. Could the circumstances under which the Miranda rights were given to him or the circumstances under which he might have to respond to waiving them also contribute to whether or not he could freely and voluntarily give up those rights?

A. Yes.

Q. Dr. Sarmiento, given your findings with regards to the person that you then knew as Danny Dean Thomas and your diagnosis, I would like, if you would, to assume the following set of facts to be true and correct.

A. Okay.

Q. That, one, Mr. Thomas was present at the time of the death of the complaining witness in this case on July 18th, 1981; that he was subsequently arrested; and that after having gone to see a psychiatrist in a hospital in Galveston with regards to finding help from her about what had happened, further assume that it's true and correct that he was transported from the jail to a magistrate and then back to jail by law enforcement officers. That he was afraid of being beaten by inmates and guards in jail or prison because of prior experiences that he had. And, further, that upon being shown a picture of the deceased that caused him to have such a tearful emotional response that an experienced peace officer broke off her interview with him and sent him back to jail and

that he at this time was tired and had been without a great deal of sleep and not very much food over the prior 48 hours.

Assuming those facts to be true can you express an opinion as to whether or not Mr. Thomas could knowingly, intelligently and voluntarily relinquish his Miranda rights at or during the making of a statement on July 19th, 1981?

A. Yes.

Q. And what is that opinion, please?

A. Well, given his mental state I would say that those kinds of conditions would be likely to aggravate, considerably aggravate and very highly likely that they would lead to such deterioration or decomposing of the individual so that, yes, I think those circumstances would increase the likelihood that he was unable to do so.

Q. Now, again, you were not there, were you?

A. No.

Q. And you can't tell us what transpired then since you weren't there, can you?

A. That's correct.

Q. But that is your opinion?

A. Yes.

MR. WENTZ: I pass the witness.

THE COURT: Mr. McClellan.

MR. McCLELLAN: Thank you, Your Honor.

Appendix Q

Relevant Portions of

Dr. Sarmiento Testimony at Punishment Trial

Trial Vol. 22, pgs. 93-110

ROBERT F. SARMIENTO, Ph. D.,

was called as a witness and after being duly sworn testifies on his oath as follows

DIRECT EXAMINATION

BY MR. WENTZ:

Q. Would you please tell us your name.

A. Robert F. Sarmiento.

Q. And are you the same Dr. Sarmiento that has testified previously in this case?

A. Yes, I am.

Q. Dr. Sarmiento, you testified last week that you saw the person that you then knew as Danny Dean Thomas in 1982 and that you interviewed him and did certain testing in 1982; is that correct?

A. That's correct, yes.

Q. And where did you do that testing and interviewing?

A. It was at the Harris County Jail.

Q. And have you had the opportunity to subsequently test and interview the person Danny Dean Thomas?

A. Yes, I have.

Q. And where did you do that?

A. Again at the Harris County Jail.

Q. And when have you done that most recently, please?

A. Let's see. I saw him on September 18th of 1998 and again on October 8th, 1998.

Q. And was the place that you were provided with adequate for your testing and interviewing purposes?

A. Yes.

Q. Now, in 1982 do you know whether or not the person that you then knew as Danny Thomas was under medication?

A. Yes, he was.

Q. And if you can tell us what effect would you expect that to have on the testing that you performed back in 1982?

A. Well, on certain tests it might interfere with a person's ability to perform at best, like on an IQ test, something of that sort. In other areas it might tend to suppress signs of pathology, overt signs of pathology because that's the purpose of those kinds of medications is to reduce symptoms of medical disorders.

Q. When you had occasion to interview and test Mr. Thomas this year do you know if he was medicated at that time?

A. Yes, he was not.

Q. And do you believe that not being medicated gave you the ability to obtain a truer picture of who he was or is?

A. Well, the fact of being medicated doesn't necessarily prevent one from obtaining a true picture; but, in some ways it would be less confounded a picture certainly.

Q. We have spoken earlier about malingering and not performing up to one's capabilities. When you conducted your interview and testing in 1998 what measures did you institute to make sure that he was giving a good effort?

A. Well, again, malingering is certainly always a possibility during an assessment. So, there are a variety of ways of to determine -- of determining whether a person is malingering or not.

Specifically, a number of the tests have scales that are designed to detect malingering or other kinds of bias, either faking good or defensiveness or malingering. You know, also in observing the person, making behavioral observations, that would be something one would be looking for. The other I guess main way is to see how consistent the various sources of information are.

So, in other words, if what the person says jives pretty well with what you see in several different tests and they all kind of make sense then this tends to rule out malingering. So, there is actually a variety of ways to do it now.

Q. Did you have occasions to interview him again in 1998?

A. Yes, I did.

Q. And why did you interview him again?

A. Well, because that's standard part of a psychological assessment basically.

Q. In the course of your interviews with the person that you have come to know as Mr. Thomas can you tell us the effect that constant moving around or being moved around as a young person growing up can have on that young child?

A. Well, of course that would depend on a lot of things. For example, if a child is -- was at an otherwise healthy environment and he is moved around --

MR. McCLELLAN: Your Honor, I would object if he's talking in the generic sense and ask that if he's testifying about what effect it had on this defendant I have no objection; but, to testify as to what moving around --

THE COURT: Let's be more specific, please.

Q. (BY MR. WENTZ) Dr. Sarmiento, with regards to Mr. Thomas, could you tell us what the effect on him being moved around was?

A. Well; I think it certainly contributed to the kind of instability, the sort of general instability in his life as a child. Now, again, not only because of the moving around but the circumstances for his moving around, his mother being remarried numerous times, being shifted from one place to another, one institution to another.

So, it is not just the moving around itself, although that can create difficulties for people, but just part of a bigger picture of sort of very chaotic, unstable sort of situation both emotionally and physically in terms of where he lived.

Q. Who or what was the dominant influence on Mr. Thomas in his early childhood?

A. Well, as with most people I would say his mother because she was probably the most consistent figure in his life even though he often was not with her.

Q. And could you tell us from your interviewing and testing what conclusions you came to with regards to her impact on Mr. Thomas?

A. Well, I would say it was very adverse. I guess one of the terms that's used to describe that kind of relationship today is toxic. She apparently was very unstable and went from one man to another, remarried numerous times. She apparently was very physically abusive. She would tie him to a bed and whip him with anything she could get her hands on, screaming and shouting at him. Just really not there for him at all and she was very abusive.

Q. Do you know whether or not his mother was ever responsible for placing him in any institutions?

A. I would assume so, yes.

MR. McCLELLAN: I object -- Your Honor, the witness does not know of his own personal knowledge -- to speculating.

THE COURT: Sustained.

Q. (BY MR. WENTZ) How did Mr. Thomas react to the childhood that is his mother exposed him to?

A. Well, I think he kind of withdrew emotionally, went into a shell where he didn't feel anything just to avoid the pain and the chaos, he kind of became a person unto himself and withdrew into a sort of shell of indifference and not caring really, sort of him against the world. He didn't feel any kind of connectiveness to any person or any institution. He just became very cold and really kind of withdrew into his own world basically.

Q. When did he regress to the impact of this child rearing?

A. Oh, I think very young. Apparently he had problems early from birth -- from early childhood in school and so on.

Q. Could you tell us did he adopt any strategies with regards to protecting himself from his environment?

A. Well, yes, as I mentioned I think what he did was to really withdraw into himself. Developed sort of an emotional wall where he was really isolated emotionally from everything else where nothing had any meaning, where he just didn't care about anything except what his own interests were.

For example, he said if he was hungry he just took food or he didn't think about whether it affected anybody else or not. But in that state of mind of total lack of caring and meaning he at least didn't feel the pain and the fear.

Q. Can you tell us is one able to overcome these reactions or these adoptive strategies later in life?

A. Well, I am in the business of helping people change. So, yes, I believe people can. It is just certainly with that kind of extreme toxic upbringing, would be very difficult; but, yes.

Q. Now, in addition to the interviewing did you have occasion to give him any further tests?

A. Yes, I did.

Q. And what tests did you give him in 1998?

A. Well, basically the same battery that I did in 1982 plus some additional tests, that is a newer test called the Personality Assessment Inventory.

Q. You testified earlier that you gave him back in 1982 a test known as the Weschsler test.

Could you compare the results of the tests 1982 to 1998?

A. Yes, sir.

Q. And what would the comparison be?

A. Well, he scored quite a bit higher. That had a 14 point increase in his intelligence scores in the full scale IQ scores and, of course, finding increase in the verbal and performance scores. So, he did substantially better. Had a full scale IQ of 105 as compared to 91 in 1982.

Q. You have talked about performing or giving to Mr. Thomas the Wide Range Achievement Test in 1982.

Could you compare the results of that test from 1982 to 1998?

A. Yes, sir.

Q. And what is that comparison?

A. Well, he again showed substantial improvement. He went from a 4.7 grade level reading to 11th grade level reading and from 3.9 I believe spelling level to 10th grade spelling level.

Q. Can you tell us what was the comparison in the Bender-Gaustalt test?

A. Yes, sir. The Bender-Gaustalt is a measure of screening measure for brain dysfunction and other kind of pathology including psychopathology. That in 1982 he showed moderate abnormalities in the Bender-Gaustalt record; in 1998 there were no abnormalities for the normal record.

Q. And with regards to the Rorschach if you could, please?

A. Yes. In 1982 there were a variety of responses on the Rorschach that showed very volatile, emotionally volatile, aggressiveness, explosiveness, just a lot of intense kind of emotional turmoil. And in 1998 it is a much more subdued record that shows, in fact, even emotional constraint rather than really explosiveness. A lot of -- much more normal records certainly.

Q. And you have mentioned a new test, the Personality Assessment Inventory. Could you tell us did this test address such issues as aggression, dominance and potential for violence?

A. Yes, it does. It is basically a measure of psychopathology. That's similar to the MMPI, but it is a newer test. But, yes, it addresses, first of all, diagnostic issues of whether any mental disorders are present and their nature, but also a number of other traits, personality traits like dominance, more aggressiveness and so on.

Q. Could you tell us the results of the Personality Assessment Inventory with regards to aggression?

A. Well, it was actually the aggression score for several ways of addressing the issue of aggression on the Personality Assessment Inventory. The most direct is the scale which assesses aggression both in terms of physical aggression, verbal aggression and aggressive attitudes. And in all three of those he was average or below average on those scores. The overall aggression score was average.

There is also an index that can be calculated based on 20 different factors looking at various combinations of scores, other factors on the PAI there are 20 indications of potential violence. And he only got one out of the 20 which was actually below the norms for your average person.

Q. Based on the interviews and testing that you did in 1998 did you come to make a diagnosis or have a diagnosis for Mr. Thomas today?

A. Yes.

Q. And what would that be?

A. Well, as far as the schizophrenia, that's in remission. In other words, there is no signs of any kind of psychotic condition at all. He does still, even though his reading and spelling has improved, I still think he has a learning disability, which just means that it's harder for him to read and to write and so on. But like most people certainly doing better at it. Also diagnosed the presence of adjustment disorder with mixed emotions which basically means basically a stress problem. He was suffering from mild depression, mild anxiety primarily related to his situation rather than the long-standing kind of condition.

There are still some kind of, I would say kind of the underlying personality traits that the measure associates with some of his more extreme problems even when he was younger are still there. He has sort of what's called schizothymia personality traits. It's the kind of person that is sort of quiet and stays off by himself a lot. Engages a lot of sort of philosophical type studies and thoughts. Is probably somewhat a little bit eccentric or odd. Has sort of eccentric interests perhaps, but I didn't consider those to be a personality disorder just simply traits, personality traits.

Q. There has been some talk about antisocial personality -- antisocial personality traits.

Are these traits results seen in criminals or sometimes seen in non-criminals?

A. They are often seen in criminals but not all criminals are antisocial; but, yes, they are also seen in non-criminals.

Q. What fields or occupations might be you be apt to see, observe these traits?

A. Well, really any field, but sometimes in fairly prominent people in politics or sales or law enforcement might have antisocial tendencies anyway or even antisocial personality disorders.

Q. When you were examining Mr. Thomas in 1998 did you see any of the features commonly associated with these traits in him?

A. Antisocial traits?

Q. Yes.

A. Yes -- I am sorry, 1992?

Q. '98.

A. '98. I am sorry. No, not really. There really wasn't any indication of antisocial traits.

Q. And could you tell us about how much time you spent with Mr. Thomas in 1998?

A. About five to six hours roughly.

Q. You obviously have come to know that Mr. Thomas is now known by another name Mr. Shisinday?

A. Yes.

Q. If you will, can you give some interpretation or meaning on this name change for us as you see it?

A. Well, I think it's really part of his attempt to kind of discover who he is or maybe reinvent who he is. To sort of establish an identity which is something that he never

had before. To sort of define himself by this name change, to sort of reestablish, or not reestablish, to establish an identity.

Q. Are you familiar with a term called "burnout" --

A. Yes.

Q. -- as it applies to individuals in your profession?

I mean in the people that you -- of my profession as well with regards to people that you examine?

A. Well, burnout is kind of an everyday term I guess to mean stressed out. Certainly that can happen in every profession, including psychology or law or whatever. But what specifically with respect to both antisocial and borderline personality disorders there is very common -- the typical course for those disorders is that they show their most extreme forms in young adulthood, 20's and so on. And as people age generally the 30's and particularly the 40's there is usually a decline in the sort of intensity of both antisocial and borderline characteristics.

So, in that sense sometimes described as a sort of burnout. So, that would be with respect to the pertinent topic of what burnout means.

Q. Based on your testing and observations of Mr. Thomas do you believe he has more or less insight into who he is today than in 1982 when you examined him previously?

A. I would say substantially more.

Q. Why do you say that?

A. Well, I guess because he demonstrates, you know, very good -- in my judgment very good understanding of, you know, how his past affected him. But even at the same -- even though I think he understands the past, how he reacted, that sort of building a wall around him and so on, I think he also recognizes that that is not a -- that is not an excuse. That even though he had a crappy upbringing if you will, pardon my French, that he was still responsible for the way he is and that basically could overcome our past no matter how bad it is. I think that is a very sophisticated kind of psychological insight.

Q. Based on your testing and observations do you feel he has a better or worse understanding for where he is in terms of his place in society today?

A. Oh, much better.

Q. And could you tell us why?

A. Well, as I say, when he was younger I think he kind of dealt with the chaos in his life and the pain and the fear by just immediately isolating himself from everyone else and from society. So, just kind of him against the world and I think he's come to see that he's part of society. With the way he said it, it is connected, it is not just by himself and that his actions affect others and that the social order exists independent of any individuals and so on. But basically that he is, I think now he feels that he's really a part of society and really understands that in a very important way.

Q. Given these changes that you are observing and describing for us do you feel he's better able to attempt to or come closer to people and have relationships with people?

A. Yes, I think he's much better able to.

Q. Are you aware that over the past years he has begun to develop relationships with people?

A. Yes, that's my understanding.

Q. And particularly by way of correspondence?

MR. McCLELLAN: Object to being hearsay. I assume that's the only way he would know.

THE COURT: Sustained as to hearsay.

Q. (BY MR. WENTZ) And with regards to your observations of Mr. Thomas is he more accepting of responsibility today or in 1982?

A. Oh, much more today I would say.

Q. And how does that factor into his development and maturity?

A. Well, I think he said that was about the third or fourth step in maturity. But basically I think accepting personal responsibility for your own actions is a real important step in kind of mental development, both just respect, like I said, to even things that happened to him when he was younger like he realizes that he is the one that took drugs and drank alcohol. No matter what had happened to him that it was his choice and that kind of thing.

Q. Do you have an opinion as to whether or not he is more dangerous today than in 1982?

A. Yes.

Q. And what is that opinion?

A. I would say he is much less dangerous. I would say he is no more dangerous now than any other person would be.

Q. Does this maturing process, this maturing process continue after the age of 43?

A. Oh, yeah. I think maturity and growth is a life-long proposition. We always continue to develop and grow as people.

Q. Have you seen any signs of remorse in Mr. Thomas?

A. Yes.

Q. In what way?

A. Well, when I saw him before he said that he was sad that the girl had died but that he didn't really take any real responsibility for that. He blamed Zendal. He blamed the police. He blamed his parents. He blamed society.

And now I think he's really come to realize that he's responsible for his own actions and really to understand why it is wrong to do that. You know, not just that you get in trouble for it -- which is a fairly primitive level of moral development -- or in the event that it's illegal, but that the principle behind it. He said the pain that it caused the family and the coworkers and everybody that knew the young woman.

So, he understood that that is why it is wrong to do things, to do something like that because of the pain it

caused, which is actually a very high level of moral development to understand kind of the principle behind right and wrong, not just the fact that it is wrong but understand why with respect to how it affects other people and so on.

MR. WENTZ: I pass the witness.

THE COURT: Mr. McClellan.

CROSS-EXAMINATION

BY MR. McCLELLAN:

Q. Well, Doctor, on that last point are you saying the defendant has indicated to you that he's responsible for the death of Miss Harrison and accepts the fact that he's the one that caused her death during the kidnapping?

A. Yes.

Q. Then why would he have plead not guilty?

A. Well --

MR. CORNELIUS: Objection, Your Honor. That calls for a comment on the defendant's --

THE COURT: Sustain your objection.

MR. McCLELLAN: No, it does not.

MR. CORNELIUS: -- right to a trial by jury. His Fifth Amendment.

THE COURT: Sustain the objection.

MR. CORNELIUS: Ask for a jury instruction.

THE COURT: The jury is to disregard the last question of the Prosecutor.

MR. CORNELIUS: Move for a mistrial.

Supreme Court, U.S.
FILED
MAY - 1 2002
OFFICE OF THE CLERK

(2)

No. 01-1267

IN THE
SUPREME COURT OF THE UNITED STATES

SHOZDIJIJI SHISINDAY AKA
DANNY DEAN THOMAS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

JOHN CORNYN
Attorney General of Texas

GENA BUNN
Assistant Attorney General
Chief, Capital Litigation Division

HOWARD G. BALDWIN,JR.
First Assistant Attorney General

*CHARLES A. PALMER
Assistant Attorney General

MICHAEL T. McCAUL
Deputy Attorney General
For Criminal Justice

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1600

ATTORNEYS FOR RESPONDENT

---

* Counsel of Record

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 1

I. Facts of the Crime 1

II. Facts Relating to the Issues Presented 1

A. Testimony From the Prior Trial 1
B. Shisinday's Insanity Defense 2
C. The Texas Death Penalty Statute 2

ARGUMENT 3

I. The Questions Presented for Review Are Unworthy of this Court's Attention 3

II. The Trial Court Properly Admitted Testimony From Shisinday's Prior Trial. 3

III. Shisinday's Prentation of an Insanity Defense Was Not Unfairly Impaired. 7

IV. The Texas Death Penalty Statute Is Constitutional. 9

CONCLUSION 12

TABLE OF AUTHORITIES

Cases **Page**

Alexander v. Johnson, 211 F.3d 895 (5th Cir. 2000) 12

Bryson v. Ward, 187 F.3d 1193 (10th Cir. 1999) 9

Coe v. Bell, 161 F.3d 320 (6th Cir. 1998) 10

Cruz v. New York, 481 U.S. 186 (1987) 6

Davis v. Alaska, 415 U.S. 308 (1974) 5

Delaware v. Fensterer, 474 U.S. 15 (1985) 4

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 4

Drope v. Missouri, 420 U.S. 162 (1975) 7

Jermyn v. Horn, 266 F.3d 257 (3rd Cr. 2001) 8

Jones v. United States, 527 U.S. 373 (1999) 9,10,12

Justus v. Virginia, 266 S.E.2d 87 10

Parker v. Randolph, 442 U.S. 62 (1979) 4

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 4,5

Riggins v. Nevada, 504 U.S. 127 (1992) 3,4,10

Romano v. Oklahoma, 512 U.S. 1 (1994) 10,11

Schlup v. Delo, 513 U.S. 298 (1995) 4

Schneble v. Florida, 405 U.S. 427 (1972) 4

TABLE OF AUTHORITIES, CONTINUED

Constitutions, Statutes, Rules **Page**

Tex. Code Crim. Proc. Ann. art. 37.0711
§ 3(d)(1)(2), (f)(2) 2

Sup. Ct. R. 10 3

PRELIMINARY STATEMENT

Shisinday seeks a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals affirming his conviction for capital murder and resulting sentence of death.

STATEMENT OF THE CASE

I. Facts of the Crime

Shisinday was convicted of capital murder for having kidnaped and killed nineteen-year-old Sylvia Harrison in July of 1981. The facts of the offense are set out in detail in the opinion of the court below. Petitioner's Appendix A at 2-5.

II. Facts Relating to the Issues Presented

A. Testimony From the Prior Trial

The State's evidence included the testimony of Ernest Gilliam from Shisinday's prior trial. State's Exhibit 67, XVIII SF 98-101.[1] Admission of the prior testimony was necessary because Gilliam had died since the first trial. State's Exhibit 68. Gilliam identified the murder weapon, State's Exhibit 10, as a gun he had sold to Shisinday the same month that he killed Harrison. XVIII SF 99-100.

---

[1] "SF" refers to the Statement of Facts, or compilation of trial testimony, and "Tr" refers to the transcript of pleadings, orders, and other documents filed in the case. Volume numbers precede and page numbers follow all record citations.

Defense counsel's cross-examination consisted of a single question, whether the gun had "one clip or two clips." XVIII SF 101.

Gilliam's testimony was cumulative of that of other witnesses. Harris County sheriff's deputy William Olive testified that on July 20, 1981, he recovered the murder weapon from Shisinday's car. XVIII SF 107, 111, 115-16. Martha Tarver also identified the gun as Shisinday's, XV SF 56, as did Doyle Peels, XV SF 97, and Ronald McHenry. XV SF 120. In addition, Shisinday gave a lengthy written confession in which he admitted owning the gun. State's Exhibit 40.

B. Shisinday's Insanity Defense

The trial court instructed the jury at the guilt-innocence phase that insanity was an affirmative defense to the charge of capital murder. 1A Tr 405. Shisinday raised no issue at trial of his inability to present that defense due to his trial demeanor.

C. The Texas Death Penalty Statute

The jury instructions at the punishment phase of trial followed Article 37.0711 of the Texas Code of Criminal Procedure. 1A Tr 117-25. The portions of the statute of which Shisinday complains provide that the jury must agree unanimously on answers to the special issues that would result in a death sentence and that at least ten jurors must agree on answers that would result in a life sentence. *Id.*, § 3(d)(1)(2), (f)(2). Petitioner's Appendix D at 4-5. During the jury's deliberations, Shisinday submitted a proposed instruction, which the trial court denied, that would have

informed the jurors that a hung jury would result in "an automatic life sentence." Petitioner's Appendix L.

ARGUMENT

I. The Questions Presented for Review Are Unworthy of the Court's Attention.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are compelling reasons therefor. Shisinday advances no compelling reason in this case, and none exists. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II. The Trial Court Properly Admitted Testimony From Shisinday's Prior Trial.

Shisinday first complains that the State was allowed to present Gilliam's testimony from his prior trial. Petition at 13-18. Because his first conviction was overturned due to a violation of *Riggins v. Nevada,* 504 U.S. 127 (1992), he reasons, introduction of the Gilliam testimony from the first trial "again deprived [him] of all the rights recognized in *Riggins* . . . ." Petition at 14.

Shisinday's requested extension of *Riggins* finds no support in this Court's decisions or in notions of fundamental fairness that undergird a criminal defendant's right to a fair trial. *Riggins* holds only that a defendant who is medicated

at trial against his will is entitled to a new trial without being "required to demonstrate how the trial would have proceeded differently if he had not been given [the drug]." 504 U.S. at 137. Consequently, when Shisinday's first conviction was reversed, he obtained all the relief available under *Riggins,* which allows him only to "challenge his *conviction*." *Id.* at 139 (Kennedy, J., concurring in the judgment) (emphasis added). Shisinday does not, because he cannot, point to any portion of that decision that created a derivative right to bar the introduction of testimony at a subsequent proceeding that fully comports with *Riggins* and every other constitutional requirement for a fair trial.

Thus understood, Shisinday's submission is simply a garden-variety claim that certain evidence was wrongly admitted. As such, it warrants reversal only if "there is a reasonable probability that the improperly admitted evidence contributed to the conviction." *Schneble v. Florida,* 405 U.S. 427, 432 (1972), *quoted in Parker v. Randolph,* 442 U.S. 62, 80-81 (1979) (Blackmun, J., concurring in part and concurring in the judgment). Given the trial record, Shisinday cannot make this showing.

Apart from *Riggins*, the only potential constitutional violation that Shisinday identifies is an alleged denial of the right of confrontation. Petition at 15 n.4. The Confrontation Clause protects a criminal defendant in two ways: the right physically to face his accusers and the right of cross-examination. *Pennsylvania v. Ritchie,* 480 U.S. 39, 51 (1987); *Delaware v. Fensterer,* 474 U.S. 15, 18-19 (1985) (per curiam). The right of cross-examination includes the right "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability

of the witness." *Davis v. Alaska,* 415 U.S. 308, 318 (1974), *quoted in Pennsylvania v. Ritchie,* 480 U.S. at 54. While Shisinday offers self-serving speculation that his medication prevented him from assisting defense counsel during cross-examination of Gilliam, he makes no particularized showing that his confrontation rights were in any way curtailed. Indeed, given the limited nature and relative unimportance of Gilliam's testimony and that it was extensively corroborated by other evidence, it is difficult to conceive how the defense might have benefited from further cross-examination.

Moreover, assuming *arguendo* that Shisinday's confrontation rights were abridged, any error surely was harmless. Whether a confrontation violation is harmless turns on several factors, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Delaware v. Van Arsdall,* 475 U.S. 673, 684 (1986). Here, the case against Shisinday, including his detailed confession, was strong. Further, Gilliam's brief testimony was of little consequence, as it concerned only the peripheral issue of how Shisinday obtained the murder weapon, as opposed to the core of the State's case -- the numerous acts of violence that Shisinday perpetrated on his victim.

Moreover, Gilliam's testimony was not contradicted and was bolstered by other evidence. Shisinday incorrectly asserts that "the Gilliam testimony served as the State's principal way of linking [him] to the gun." Petition at 8. In

fact, as noted above, numerous other witnesses gave similar testimony, including Harris County sheriff's deputy William Olive, XVIII SF 107, 111, 115-16; Martha Tarver, XV SF 56; Doyle Peels, XV SF 97; and Ronald McHenry. XV SF 120. Shisinday also confessed that the gun was his. State's Exhibit 40.[2] Thus, there is no substance to Shisinday's assertion that Gilliam's testimony "was of critical importance to the State's case." *Id.* Admission of that testimony, if error, was harmless beyond a reasonable doubt.[3]

---

[2] Shisinday characterizes his confession as "extremely questionable." Petition at 7. In fact, it was "probably the most probative and damaging evidence that can be admitted against him." *Cruz v. New York*, 481 U.S. 186, 195 (1987) (White, J., dissenting). Moreover, the confession was held by the court below to be admissible, Petitioner's Appendix A at 16-17, a determination that Shisinday does not ask this Court to review.

[3] Shisinday also asserts that Gilliam's testimony was more important at his second trial because the State introduced DNA evidence that "demonstrated that blood from the victim was present on the gun . . . ." Petition at 8. Shisinday does not explain this statement, and it makes no sense. The DNA evidence aside, there never has been any question that State's Exhibit 10 was the murder weapon. The State's need to link the weapon to Shisinday (which it did through numerous witnesses) was not affected by introduction of the DNA evidence.

III. Shisinday's Presentation of an Insanity Defense Was Not Unfairly Impaired.

In a related claim, Shisinday argues that the *Riggins* violation at his first trial, coupled with the passage of time, somehow impaired his presentation of an insanity defense at the retrial. Petition at 19-23. Because his mental illness was in remission at the second trial, the argument goes, his "normal" trial demeanor did not support his assertion of insanity at the time of the offense.

This claim fails for several reasons. First, Shisinday's trial demeanor was, at most, highly attenuated evidence of his mental state at the time of the offense. Shisinday concedes as much, acknowledging that "*Drope* [*v. Missouri,* 420 U.S. 162 (1975)] affirms the significance of courtroom demeanor on the issue of competency to stand trial, but does not address the relevance of demeanor in the situations presented by [his] case." Petition at 20. He thus fails to show error in the holding of the court below that "Shisinday's competency at the time of his second trial has no bearing on whether he was insane at the time of the offense." Petitioner's Appendix A at 9. The cases that Shisinday cites as being in conflict, Petition at 21-22, do not show a true conflict of decisions, as none of them granted relief on the basis that he urges. The Texas cases that he cites as apparently being "at odds" with the decision in his case, Petition at 22 n.7, are even less persuasive, as they deal with the defendant's demeanor near the time of the offense, not at the time of trial. There is, in short, no conflict of authority on this point, much less a conflict sufficient to justify *certiorari* review. Moreover, even assuming the existence of a conflict, Shisinday cannot prevail on this claim

for the reasons discussed below. Where, as here, resolution of a conflict is irrelevant to the ultimate outcome of a case, review should be denied.

Second, assuming *arguendo* that Shisinday's demeanor was relevant to his claim of insanity, he fails to show that the State was responsible for his inability to present an "insane" demeanor at retrial. That his mental illness went into remission was due to the passage of time rather than state action. Indeed, for ten years–from the date of Shisinday's trial until *Riggins* was decided--there was no legal basis for overturning his conviction. During that time, the State had no reason for delay, and the passage of time actually inured to Shisinday's benefit.

Finally, even assuming relevance and state action, Shisinday nonetheless fails to show a federal constitutional violation in light of the great deal of evidence of insanity, including expert testimony, that he did present at trial. *See* Petition at 8 ("Petitioner presented extensive evidence of his mental illness at trial, in an effort to support his insanity defense during the guilt trial and his arguments in favor of mitigation during the sentencing phase of trial"). Given that evidence, which the jury obviously did not credit, it is fanciful to suggest that a different trial demeanor would have tipped the scales in favor of a finding of insanity. *See, e.g., Jermyn v. Horn,* 266 F.3d 257, 285 (3rd Cir. 2001) (trial counsel not ineffective in not presenting additional evidence of insanity, and state supreme court's "conclusion that Jermyn could not establish that he was prejudiced by his counsel's actions is not objectively unreasonable, given the wealth of evidence counsel actually presented concerning the nature of Jermyn's mental illness, its manifestations, and his

probable insanity at the time of the murder").

For the same reasons, Shisinday's changed demeanor did not affect the fundamental fairness of the punishment phase of trial. Numerous courts of appeals have held that the exclusion of mitigating evidence can be harmless. *E.g., Bryson v. Ward,* 187 F.3d 1193, 1205 (10th Cir. 1999). In addition to his evidence of mental illness, Shisinday also presented an array of mitigating evidence, including good behavior in jail and prison, XXII SF 45-58, 62-67, 79-87, XXIII SF 129-33, 136-37, 143-44; expert testimony that his I.Q. had risen and his anti-social traits had disappeared during his incarceration, XXII SF 93-104; expert testimony that his deprived childhood had caused his criminal behavior, XXII SF 97, XXIII SF 8-20; and extensive records documenting his mental illness and experience with mental health and school authorities. XXII SF 133-44. Given that his jury was not persuaded by that evidence, "no reasonable juror would have considered [his demeanor] sufficiently mitigating to warrant a penalty less than death." *Id.*

IV. The Texas Death Penalty Statute Is Constitutional.

Shisinday's final complaint is that the Texas statute, facially and as applied to him, is unconstitutional because it forbids a trial court from instructing the jury what would happen in the event of a hung jury on punishment. Petition at 23-29. This claim fails under *Jones v. United States,* 527 U.S. 373 (1999). There, in rejecting a similar challenge in a federal death penalty case, the Court noted it had "never suggested . . . that the Eighth Amendment requires a jury be instructed as to the consequences of a breakdown in the deliberative process." *Id.* at 382. It is not error, therefore, to

refuse an instruction that informs the jury of the effect of an inability to agree, because "the proposed instruction has no bearing on the jury's role in the sentencing process. Rather, it speaks to what happens in the event that the jury is unable to fulfill its role–when deliberations break down and the jury is unable to produce a unanimous sentence recommendation." *Id.* "The jury's role was to deliberate and to attempt to reach a unanimous verdict. The fact that there was a statutorily defined default rule in case the jury could not agree does not change this fact." *Coe v. Bell,* 161 F.3d 320, 340 (6th Cir. 1998). Shisinday's claim is foreclosed by *Jones,* and he cannot show a conflict that might warrant *certiorari* review because the courts of appeals "are uniform in rejecting the argument that the Constitution requires an instruction as to the consequences of a jury's inability to agree." *Jones,* 527 U.S. at 382 n.6.

In citing *Romano v. Oklahoma,* 512 U.S. 1 (1994), for the proposition that his jury was misled, Petition at 26, Shisinday ignores the *Jones* Court's admonition that a jury not instructed as to deadlock consequences is "[i]n no way . . . misled" within the meaning of *Romano.* 527 U.S. at 382. Moreover, Shisinday's argument is just the opposite of that advanced by Romano, that certain evidence "impermissibly undermined the sentencing jury's sense of responsibility . . . ." 512 U.S. at 9. Instead, Shisinday contends that his jury should have been given an instruction that"would have been an open invitation for the jury to avoid its responsibility and to disagree." *Justus v. Virginia,* 266 S.E.2d 87, 92 (Va. 1980), *quoted in Jones,* 527 U.S. at 384.

Further, Shisinday's attempts to distinguish *Jones,* Petition at 27-29, are unavailing. First, they are irrelevant, as

the *Jones* Court's holding that a deadlock instruction was not constitutionally mandated did not turn on the particular facts of that case. Moreover, the instructions that Shisinday's jury was given were accurate statements of the law, and thus "the jury was not affirmatively misled regarding its role in the deliberative process . . . ." *Romano,* 512 U.S. at 9. The instruction that ten jurors must agree on answers to support a life sentence correctly expressed Texas law, and its accuracy was not diminished simply because the jurors were not further instructed on an altogether different matter that was not their concern: what the law required in the event they could not agree.

Shisinday also complains that, unlike the petitioner's submission in *Jones,* the Texas statute "prohibits the trial court from *ever* instructing the jury as to the consequences of a failure to agree." Petition at 26-27 (original emphasis). This distinction is a *non sequitur,* as the lack of a constitutional basis for such an instruction confirms the validity of the Texas rule.

Equally meaningless is Shisinday's assertion that the Texas statute "appears to operate in the way it does by virtue of a mistake, not by design." Petition at 27. First, exercising certiorari jurisdiction to delve into this unimportant state-law question would be an unwise expenditure of the Court's resources. Further, assuming *arguendo* that the legislative history of the statute supports Shisinday's position, he nonetheless fails to show that the statute operates unconstitutionally, as discussed above.

Finally, accepting *arguendo* Shisinday's argument that he was prejudiced by the absence of a deadlock-

consequences instruction, Petition at 28-29, prejudice alone is insufficient to justify Supreme Court review. Obviously, every petitioner before this Court suffered some degree of prejudice in the courts below. Shisinday was not unfairly prejudiced, however, because under *Jones,* his "substantive argument is meritless." *Alexander v. Johnson,* 211 F.3d 895, 897 n.5 (5th Cir. 2000).

CONCLUSION

For the foregoing reasons, the State respectfully requests that Shisinday's petition for writ of certiorari be denied.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas

HOWARD G. BALDWIN, JR.
First Assistant Attorney General

MICHAEL T. McCAUL
Deputy Attorney General for
Criminal Justice

GENA BUNN
Assistant Attorney General
Chief, Capital Litigation Division

CHARLES A. PALMER
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1600
(512) 320-8132 (Fax)

ATTORNEYS FOR RESPONDENT